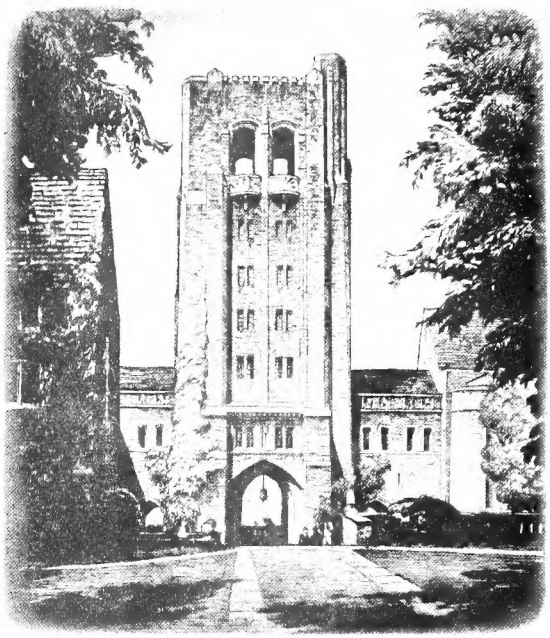

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THE

LAW AND PRACTICE

IN

SPECIAL PROCEEDINGS,

AND IN

SPECIAL CASES,

WITHIN THE COURTS, ETC.

OF THE

STATE OF NEW YORK;

WITH AN

APPENDIX OF FORMS.

BY

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PREFACE.

The practice in special proceedings forms peculiarly a system by itself, being entirely different and distinct from the practice in civil actions under the Code of Procedure. It is in many cases, also, summary in its nature, requiring prompt and efficient action, and often involving delicate and important questions bearing directly upon the rights of person and property. The necessity for a work collecting together the authorities on the subject, and arranging them in proper form, so as to present clearly and distinctly the law and the practice in those proceedings, has long been felt; and it is the object of the following pages to supply such a work. There are several subjects, however, properly coming under the head of special proceedings, or proceedings in special cases, which are not included in the volume; for the reason that to introduce them all would render it inconveniently large. But the more important of them are here considered.

In the preparation of the work, I have endeavored to give the practice fully on each of the subjects considered, from

the commencement or institution of the proceedings, down to and including the judgment; and also the proceedings upon appeals from the judgment, where the practice is different from appeals in ordinary cases.

Much attention has been given to the forms in the Appendix; which are designed to be full and complete. In preparing them, I have carefully consulted the statute, as well as the approved books of practice which have treated of the subject under consideration, and have derived valuable assistance from the works of Messrs. Barbour, Burrill, Tillinghast, and others. A separate index to the forms may be found at the end of the volume.

An index to the work itself may also be found at the end of the volume; and to increase still further the facilities for reference, I have prefixed to the volume an analysis of the several chapters and sections.

The authorities, and cases adjudicated by the courts, are brought down to the latest published reports; and the intention has been to include all the authorities and cases found in the reports of this State bearing upon the subjects considered.

In submitting the work to the favorable consideration of the profession, I do not claim that it is free from error. The variety of the subjects treated, their entire independence of each other, and the complication of the practice under them, owing mainly to the change in our constitution, and our judicial system, since the statutes were passed, and the effect of the Code of Procedure upon them, have rendered

the preparation of the work difficult and perplexing; and it will not be surprising if some errors should be found in it.

But whatever may be its imperfections, it is submitted to the profession in the belief that, it will, notwithstanding, prove useful and convenient, and lessen somewhat their labors in the practice under the several subjects considered.

Salem, N. Y., *November*, 1858.

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PRACTICE

IN

SPECIAL PROCEEDINGS AND CASES.

CHAPTER I.

ADMEASUREMENT OF DOWER. (*a*)

If dower is not assigned to the widow within forty days after the decease of her husband, she is authorized to proceed by petition for the admeasurement thereof under the statute. 2 *R. S.*, 488, *sec.* 1. And she is also entitled to proceed, for that purpose, by summons and complaint, under the Code of Procedure. The complaint, in such case, is regarded as a substitute for the proceeding by petition, or for the former bill in equity. 2 *Sand. S. C. R.*, 711, 715; 4 *Paige*, 98. The usual and more expeditious course, however, is to proceed by petition, under the statutory provisions herein considered.

The proceedings, under the statute, are no evidence of title, nor of anything more than that the part assigned belongs to the widow, after a title is shown to the whole. 5 *Cowen*, 168; *Id.* 299; 6 *Id.* 316; 17 *Johns.* 123; 12 *Wend.*

(*a*) For the law on the subject of dower, in general, see 1 *R. S.* 740, *secs.* 1 *to* 25; *Laws of* 1845, *p.* 94; *Rev. Notes*, 3 *R. S.* 2*d ed.* 596; 4 *Kent's Com.* 35 *to* 72. 1 *Bl. Com.* 129.

137. The widow may proceed, in the first instance, to establish her title by action, and obtain an admeasurement of her dower in the same proceeding, 2 *R. S.* 303; *Ib.* 311, *sec.* 55, *post;* or she may obtain an admeasurement of such dower in the usual method under the statute, and afterwards commence her action to recover the possession of the part assigned to her. *Ib.* 491, *sec.* 18, *post.*

But she cannot enter for her dower until it is assigned; nor can she alien it, so as to enable the grantee to sue for it in his own name, 20 *Johns.* 411; 17 *Id.* 167; 13 *Wend.* 524; though, it seems, where she is in possession, or is entitled to an assignment of dower immediately, her interest may be reached upon a creditor's bill, and applied to the satisfaction of a judgment against her. 4 *Paige*, 448. She has no estate, however, in the lands, until assignment. Her right, until then, is a right resting in action only. 2 *Cowen*, 638; 1 *Barb. S. C. R.* 500; 3 *Id.* 319. And after the expiration of her quarantine, the heir may put her out of possession, and drive her to her suit for her dower. *Id. ibid.;* 7 *Johns.* 247.

How, and to what Court, the Widow to apply.] The statute provides that any widow who shall not have had her dower assigned to her within forty days after the decease of her husband, may apply, by petition, for the admeasurement of her dower, to the Supreme Court; or to the County Court of the county where the lands are situated; or to the surrogate of the same county; or, in the city of New York, to the Court of Common Pleas of that city, where the lands are situated therein. 2 *R. S.* 488, *sec.* 1; *Laws of* 1847, *p.* 328, *sec.* 29; *Code of Pro. sec.* 30, *sub.* 5; *Laws of* 1854, *p.* 464, *sec.* 6. And in the city of Buffalo, the application may also be made to the Superior Court of that city, when the premises are situated therein. *Ib. p.* 224.

The petition should specify the lands to which the widow claims dower, 2 *R. S.* 488, *sec.* 1; and it seems, it is not necessary that it should state that her husband had been dead forty days when it was presented. 7 *Cowen*, 356. For form of petition, see *Appendix*, No. 1.

Service of Petition and Notice.] A copy of the petition, with notice of the time and place when it will be presented, must be served at least twenty days previous to its presentation, upon the heirs of her husband; or if they are not the owners of the lands subject to dower, then upon the owners of such lands claiming a freehold estate therein; or their guardians, when any such heirs or owners are minors. 2 *R. S.* 488, *sec.* 2. And unless such notice is given, the proceedings will be set aside. *See* 6 *Johns.* 281; 15 *Id.* 533. For form of notice, see *Appendix*, No. 2.

But persons in the possession of the premises, as tenants for one or more years, are not entitled to notice. It is necessary to give notice only to the owners of the freehold. 12 *Wend.* 137, 138.

And where, in proceedings before a surrogate, due notice of the application was given to the tenant, who did not attend before the surrogate, and the latter appointed three commissioners, according to the statute, but on ascertaining that one of them could not serve by reason of ill health, substituted another in his place; it appearing from the surrogate's return that both the first appointment and the substitution took place on the day for which the application was noticed,—it was held that the whole should be regarded as one continuous act, and the substitution, therefore, regular, without any additional notice. 2 *Hill*, 543.

The notice may be served personally, on any party of full age; or upon the guardians of minors; or by leaving the same with any person of proper age, at the last residence of such party or guardian, in case of his temporary absence; and if any such heir or owner be a resident out of this State, the service of such notice may be upon the tenant in actual occupation of the lands; or if there be no tenant, by publishing the same for three weeks successively, in some newspaper printed in the county where such lands are situated. 2 *R. S.* 488, *sec.* 3.

And where the owners, or any of them, are minors, having no guardian, and a guardian ad litem is appointed for the purpose of appearing and taking care of their interests, the

notice of the application must be served upon such guardian ad litem. *Ib. secs.* 4, 5.

Appointment of Guardian for Infant Owners.] Where the heirs or owners are minors, and have no guardian, the court or surrogate, on application of the widow, will appoint some discreet and substantial freeholder a guardian of such infants, for the sole purpose of appearing for, and taking care of, the interest of such infants in the proceedings. *Ib. sec.* 4. For forms of petition for appointment of guardian, and order thereupon, see *Appendix*, Nos. 5 and 6.

And notice of the application for the admeasurement of dower, and all notices in the subsequent proceedings, must be served on such guardian, whether the infant resides within this State or not. *Ib. sec.* 5.

Proceedings by Heirs, &c., for Admeasurement.] The statute also provides, that after the expiration of forty days from the death of any husband, his heirs, or any of them, or the owners of any land subject to dower, claiming a freehold estate therein, or the guardian of any such heirs or owners, may, by notice in writing, require the widow of such husband to make demand of her dower within ninety days after the service of such notice, of the lands of her deceased husband, or of such part thereof as shall be specified in such notice. *Ib.* 489, *sec.* 6. For form see *Appendix*, No. 3.

If such widow does not make her demand of dower, within the time specified in such notice, by commencing a suit, or by an application for admeasurement as prescribed by the statute; or if she does not make such demand within one year after her husband's death, although no notice to that effect shall have been given; the heirs of the husband of such widow, or any of them, or the owners of any lands subject to dower, claiming a freehold interest therein, or the guardian of any such heirs or owners, may apply by petition to the Supreme Court, or to the County Court of the county where the lands are situated, or to the Surrogate of the same county, or, in the city of New York, to the Court of Common Pleas of that city,

where the lands are situated therein, or to the Superior Court of the city of Buffalo, where the premises are situated within that city, for the admeasurement of the said widow's dower of the lands of her husband, or of such part thereof as shall be specified in the said petition. 2 *R. S.* 489, *sec.* 7; *Laws of* 1847, *p.* 328, *sec.* 29; *Code of Pro.*, § 30; *Laws of* 1854, *p.* 464; *Ib. p.* 224, *sec.* 9.

A copy of the petition, with notice of the time and place of presenting the same, must be served personally on the widow, twenty days previous to its presentation. 2 *R. S.* 489, *sec.* 8. For forms, see *Appendix*, No. 4.

Order that Admeasurement be made.] Upon the application being made, either by a widow, or by any heir or owner, or by the guardian of such heir or owner (*a*), the court or surrogate to whom the same shall be made, may, upon hearing the parties, order that admeasurement be made of such widow's dower of all the lands of her husband, or of such part thereof as shall be specified in the application. 2 *R. S.* 489, *sec.* 9.

The order directing admeasurement to be made, is usually embodied in the order for the appointment of commissioners. For form, see *Appendix*, No. 7.

Order appointing Commissioners and proceedings thereon.] The court or surrogate, on the application, is required to appoint three reputable and disinterested freeholders, commissioners, for the purpose of making the admeasurement, by an order specifying the lands of which dower is to be admeasured, and the time at which the commissioners shall report. 2 *R. S.* 489, *sec.* 10. For form, see *Appendix*, No. 7.

The order specifying the time at which the report shall be made, is in the nature of an adjournment or continuance of

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(*a*) Only the persons here named are entitled to apply for the admeasurement of dower. And, therefore, where a purchaser of a widow's right of dower had the dower admeasured and assigned to him, it was held that the proceeding was void, and conferred no title under the statute, even though the heir or his guardian consented to it. 20 *Johns.* 411; *and see* 2 *Cow.* 638; 17 *Johns.* 167; 13 *Wend.* 524; 1 *Barb. S. C. R.* 500; 3 *Id.* 319.

the proceedings; and, therefore, upon the coming in of the commissioners' report, at the time specified, it may be confirmed, on motion of either party, without notice to the other for that purpose. 2 *Hill*, 543.

In the proceedings for the appointment of commissioners, an inquiry whether a settlement has been made by the husband in lieu of dower, cannot be gone into. If there is a defence to her claim, it must be set up in the action which she brings to recover the part assigned to her. 4 *Wend.* 630; 4 *Brad. R.* 15.

No appeal lies from the order of the court or surrogate, appointing commissioners; but only from the order confirming their report. *See* 2 *R. S.* 491, *sec.* 19; *Ib.* 611, *sec.* 118; *and* 10 *Johns. R.* 368.

Oath of Commissioners.] The commissioners appointed, before entering upon their duties, must be sworn before the surrogate who appointed them, or before some officer authorized to take affidavits, that they will faithfully, honestly, and impartially discharge the duty and execute the trust reposed in them by such appointment. 2 *R. S.* 489, *sec.* 11. And it seems the oath may be administered by the attorney conducting the proceedings. 4 *Wend.* 195; *and see* 9 *How. Pr. R.* 64, 67. For form of oath, see *Appendix*, No. 8.

Vacancies, how supplied, &c.] If the persons appointed commissioners, or either of them, shall die, resign, or neglect or refuse to serve, others may be appointed in their places, by the court or surrogate who appointed the first commissioners, and shall take the same oath. 2 *R. S.* 490, *sec.* 12; *Ib. sec.* 14.

If the first appointment was made by a surrogate, the new commissioner may be appointed by his successor in office. 8 *Wend.* 460.

Admeasurement by Commissioners.] The commissioners, in making admeasurement, are directed by the statute to proceed as follows:

They must admeasure and lay off, as speedily as possible,

the one third part of the lands embraced in the order for their appointment, as the dower of the widow, designating such part with posts, stones, or other permanent monuments. 2 *R. S.* 490, *sec.* 13, *sub.* 1.

They must take into view, in making the admeasurement, any permanent improvements made upon the lands embraced in the order, by any heir, guardian of minors, or other owners, since the death of the husband of such widow, or since the alienation thereof by such husband; and if practicable, must award such improvements within that part of the lands not allotted to such widow; and if not practicable so to award the same, they must make a deduction from the lands allotted to such widow, proportionate to the benefit she will derive from such part of the said improvements as shall be included in the portion assigned to her. *Ib. sub.* 2.

And to aid them in such admeasurement, they may employ a surveyor with necessary assistants. *Ib. sub.* 4.

In the proceedings for the admeasurement of dower, the commissioners have no power to decide upon the widow's right in the land. And, therefore, where the order directs them to set off one third of certain premises, they have no right to confine their admeasurement to one sixth, upon the ground that the husband was entitled only to one half of the land. 1 *Cowen*, 463. Nor can the commissioners, in ascertaining the part to be assigned, make any deduction, in consequence of any conveyance of land made by the husband to the wife during marriage. 4 *Wend.* 630. Nor can they inquire whether a settlement was made by the husband in lieu of dower. *Ib.* The proceeding assumes that the widow is entitled to dower out of the lands in question; and if there is a defence to her claim, it must be set up when she brings her action to recover the part assigned to her. *Ib.*

Where the lands have been alienated by the husband, the wife, after his death, is entitled to dower only according to the value of the land at the time of the alienation; and those facts are proper to be shown to the commissioners appointed to make the admeasurement. 10 *Wend.* 529; *Ib.* 480; 4 *Brad. R.* 15; *and see* 2 *Johns.* 484; 13 *Id.* 179; 6 *Johns. Ch. R.*, 258; 2 *Ed. Ch. R.* 577.

The dower must, in general, be assigned by metes and bounds; yet there are exceptions to this rule,—*e. g.*, where the subject-matter is of such a nature that no division can be made which will give the parties the enjoyment of their respective shares in severalty; in which cases, it may be so assigned as to give the widow one third of the profits, or the parties may have an alternate occupation of the whole, &c. 2 *Hill*, 544.

And where the premises consisted of a village lot, with a dwelling-house thereon, and the commissioners, among other things, assigned to the widow particular rooms in the house, with the right of using the stairways, halls, &c., so as to afford ingress and egress for the enjoyment of the rooms,—it was held, that it was not an assignment to which the tenant could legally object; though otherwise, it seems, as to the widow. *Ib.; and see* 4 *Brad. R.* 15.

The commissioners may also assign to the widow, dower in mines which were opened and worked in the lifetime of her husband; but not of such as were unopened. And it may be assigned, either collectively with other lands, or separately of themselves; and if not practicable to assign it by metes and bounds, a proportion of the profits, or the separate alternate enjoyment of the whole for short proportionate periods, may be assigned. 1 *Cowen*, 463 (*a*). For form of order directing commissioners how to proceed in such case, see *Appendix*, No. 15.

Notice of the proceedings of the commissioners should be given to the owners of the premises, or to their guardians, if such owners are minors. *See* 9 *How. Pr. R.* 71; 15 *Johns. R.* 537; 23 *Wend.* 632, 633.

Report of Commissioners.] The commissioners are required, by the statute, to make a full and ample report of their proceedings, with the quantity, courses, and distances of the land admeasured and allotted by them to the widow, with a description of the posts, stones, and other permanent

(*a*) And whether rent out of land can be assigned by the commissioners in lieu of dower, *quære?* *See* 2 *Hill*, 544, 549; *and* 2 *Ed. Ch. R.* 579.

monuments thereof, and the items of their charges, to the court by which they were appointed, at the time specified in the order for their appointment. 2 *R. S.* 490, *sec.* 13, *sub.* 3. For form, see *Appendix*, No. 9.

The court or surrogate appointing the commissioners, may, upon their application, or that of either party, enlarge the time for making their report; and may, by order, compel such report, or discharge the commissioners neglecting to make the same, and appoint others in their places. 2 *R. S.* 490, *sec.* 14.

The report is required to be filed and entered at large in the minutes of the court to which the same shall be made, or in a book to be provided by the surrogate for that purpose, when made to him. *Ib. sec.* 15.

Fees of Commissioners, Surveyors, &c.] The fees allowed by law to commissioners, are two dollars to each for every day's actual and necessary service. 2 *R. S.* 643, *sec.* 35.

And the surveyor, if one is employed, is allowed for actual service in surveying, laying out, marking, and mapping the premises of which dower is admeasured, two dollars and fifty cents per day; and for each of his necessary chain and flag bearers, and other necessary assistants, one dollar per day. *Ib. sec.* 34.

Setting aside Report, or Confirmation, &c.] The court or surrogate to whom the report is made, may, at the time appointed for receiving the same, or at such other time to which the hearing has been adjourned, on good cause shown, set aside the report, and appoint, as often as may be necessary, new commissioners, who are required to proceed in the manner above directed. 2 *R. S.* 490, *sec.* 16; 7 *Cowen*, 353.

Notice of the motion should be given to the opposite party, accompanied with copies of the papers upon which the application is founded. *See* 1 *Id.* 176.

If the report is not set aside, the court or surrogate is required, by order, to confirm the said report and admeasurement. 2 *R. S.* 490, *sec.* 16. For form of order, see *Appendix*, No. 11. And upon the coming in of the report at the

time appointed for receiving the same, it may be confirmed, on motion of either party, without notice to the other for that purpose. 2 *Hill*, 543. But see form of notice to confirm report, in *Appendix*, No. 10.

Effect of Admeasurement.] The statute provides, that the admeasurement so made and confirmed, shall, at the expiration of thirty days from the date of such confirmation, unless appealed from, be binding and conclusive, as to the location and extent of the widow's right of dower, on the parties who applied for the same, and on all parties to whom notice shall have been given, as hereinbefore directed. 2 *R. S.* 491, *sec.* 17.

But no person will be precluded thereby from controverting the right and title of such widow to the dower so admeasured. *Ib.; and see* 4 *Brad. R.* 15. The proceedings are no evidence of title, nor of anything more than that the part assigned belongs to the widow after a title is shown to the whole. 5 *Cow.* 168; 6 *Id.* 316; 17 *Johns.* 123; 12 *Wend.* 137.

The Widow may bring an Action to Recover Possession, &c.] At the expiration of thirty days from the date of the confirmation of the commissioners' report, unless the same be appealed from, the widow may bring an action to recover the possession of the lands so admeasured to her for her dower (in which her right to such dower may be controverted), and upon recovery, may hold the same during her natural life, subject to the payment of all taxes and charges accruing thereon, subsequent to her taking possession. 2 *R. S.* 491, *sec.* 18.

The action is commenced by summons, or summons and complaint, under the Code of Procedure; and the general provisions of the Revised Statutes relating to actions concerning real property (2 *R. S.* 302, *&c.*), apply to the action, according to the subject-matter of it, and without regard to its form. (*a*) *Code of Pro.* §§ 455, 471.

(*a*) The widow may bring an action, also, to recover her dower, notwithstanding that it has not been admeasured. *See* 2 *R. S.* 303; *Code of Pro.*

Appeals.] It is provided by the statute, that where the commissioners have been appointed by a county court, or the Court of Common Pleas of the city of New York, or by a surrogate; the widow and any heir or owner of lands affected by the proceeding, or the guardian of such heir or owner, (*a*) may, within thirty days after the order of confirmation of the report of the commissioners by such court or surrogate, appeal from such order, to the Supreme Court, in the manner prescribed by the statute. 2 *R. S.* 491, *sec.* 19; *Ib.* 611, *sec.* 118; *and see Code of Pro.* § 30; *Laws of* 1854, *p.* 464.

Where, however, the order of confirmation is made by the Court of Common Pleas of the city of New York, the appeal is now to the same court at general term. *See Code of Pro.* §§ 8, 348, 349, 471; 9 *How. Pr. R.* 304, 311; *s. c.* 3 *Duer*,

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§ 455; 3 *Selden*, 201, 209. And it is not necessary, in such case, that she should demand her dower before bringing the action (*ib.*); though if the action is to recover dower, before admeasurement, of property which has been aliened by the husband, the widow cannot recover costs of the action unless it appear that the dower was demanded and refused before the action was commenced. *Code of Pro.* § 307.

Where the widow recovers in an action for her dower, before admeasurement, the statute provides, that instead of a writ of possession being issued, the plaintiff shall proceed to have her dower assigned to her in manner following:

1. Upon the filing of the record of judgment, the court, upon the motion of the plaintiff, shall appoint three reputable and disinterested freeholders, commissioners for the purpose of making admeasurement of the dower of the plaintiff, out of the lands described in the record; and the commissioners so appointed shall proceed in like manner, possess the like powers, and be subject to the like obligations and control, as commissioners appointed pursuant to the statutory provisions herein considered.

2. The report of the commissioners may be appealed from by any party to the action, within the same time, and the like proceedings shall be had thereupon as are prescribed by the said statutory provisions.

3. Upon the confirmation of the report of the commissioners, a writ of possession shall be issued to the sheriff of the proper county, describing the premises assigned for the dower, and commanding the sheriff to put the defendant in possession thereof. 2 *R. S.* 311, *sec.* 55.

And the costs and expenses incurred in such admeasurement of dower shall be subject to the like provisions herein considered. *Ib.* 312, *sec.* 56.

(*a*) Whether an appeal will lie in behalf of a tenant, where he has suffered the report of the commissioners to be confirmed by default, *quære?* 2 *Hill*, 544, 550.

616; 2 *Sand. S. C. R.* 740; 6 *How. Pr. R.* 179; *Ib.* 319; 2 *Abb. Pr. R.* 21, 24; *and see, also, Laws of* 1854, *p.* 592, *post, note a, at the end of this chapter.*

The appeal must be filed with the surrogate, or with the clerk of the court granting the order of confirmation. 2 *R. S.* 491, *sec.* 20. For form of notice, see *Appendix*, No. 12.

But the appeal will not be effectual or valid for any purpose until a bond to the adverse party shall be executed by the appellant, and filed with the surrogate or clerk, with security, to be approved by the surrogate or a judge of the court by which such order was made, and to be evidenced by an endorsement on such bond, in the penal sum of one hundred dollars, conditioned for the diligent prosecution of such appeal, and for the payment of all costs that may be adjudged by the Supreme Court against the appellant; and no other notice or proceeding will be necessary to perfect the appeal. 2 *R. S.* 491, *sec.* 20. For form of bond, see *Appendix*, No. 13.

In addition to the appeal authorized by the above provision of the Revised Statutes, an appeal may no doubt also be taken to the general term of the Supreme Court from the order confirming the report of the commissioners, made at a special term of that court. (*a*) *Laws of* 1854, *p.* 592, *sec.* 1; *and see* 2 *Kernan*, 406; 12 *How. Pr. R.* 97; *s. c.* 2 *Abb. Pr. R.* 368; 10 *How. Pr. R.* 168. The practice in such case is regulated in part by the Code of Procedure, sections 327, 329, 330, and 332 of which apply to the proceedings on such appeal. *Laws of* 1854, *supra.* (*b*)

And so, an appeal lies, also, from the order of confirmation, made by the special term of the Superior Court of the city of Buffalo, to the general term of that court. *Laws of* 1854, *p.* 227, *secs.* 19 *and* 26; *Laws of* 1857, *vol.* 1. *p.* 753; *Laws of* 1854, p. 592.

(*a*) And whether an appeal may not be taken from the decision of the court at general term, to the Court of Appeals, *quære? See* 2 *R. S.* 492, *secs.* 23, 24, *post; Code of Pro.* § 11; 1 *Kern.* 55; *Ib.* 276; 2 *Id.* 409; *Laws of* 1857, *vol.* 1, *p.* 753.

(*b*) See the act of 1854, and the sections of the Code here referred to, in note *a* at the end of this chapter.

Duty of the Clerk or Surrogate on the Appeal.] The statute makes it the duty of the surrogate or the clerk of the court with whom the appeal and bond is filed, on receiving the amount of his fees for the service, to transcribe the petition, affidavits, notices, orders, reports, and all other proceedings on the application, together with the appeal, to certify them under his official seal, and to transmit such copies to the appellate court. 2 *R. S.* 491, *sec.* 21.

How Appeal brought on, and Practice therein.] The statute provides that the hearing of the appeal by the Supreme Court shall be brought on by notice, and shall be conducted as other special motions. 2 *R. S.* 492, *sec.* 27. The appeal is heard at the general term.

The notice of hearing, and all other necessary notices in the Supreme Court, may be served on any party, not residing within this State, by leaving the same with the surrogate, or the clerk of the court from whose order the appeal is made, for the use of such party. 2 *R. S.* 492, *sec.* 27.

The Supreme Court may, by rule, direct further returns to be made, whenever the same shall be necessary. *Ib.* And it is authorized, also, to establish such rules to regulate the practice on the appeal as it may deem expedient. *Ib.* No rules, however, have been adopted by the Supreme Court under this provision.

Proceedings by the Appellate Court.] The appellate court is required to proceed to the hearing and determination of the appeal, and to review all the proceedings upon the application, and to do therein what shall be just. 2 *R. S.* 491, *sec.* 22. But only the regularity and fairness of the proceedings will be examined into. 4 *Wend.* 630. And the court will look only to the papers which have been returned; and will not permit affidavits to be read on either side which were not received on the argument below. *See* 2 *Hill*, 543.

In case the order of confirmation is reversed, the court is required to cause the same to be certified to the surrogate or

court making such order, to the end that new commissioners may be appointed, or a new admeasurement may be had, as the Supreme Court shall direct; or the court may proceed to appoint commissioners to make admeasurement, in the same manner as upon an original application to such court, and the like proceedings shall be had thereon. 2 *R. S.* 492, *sec.* 23. For forms of order, see *Appendix*, Nos. 14 and 15.

In case of the affirmance of the order of confirmation, the appellate court is authorized, in its discretion, to award costs to be paid by the appellant, and to be taxed as the court shall direct; and the original order of confirmation, and the admeasurement confirmed thereby, will be binding and conclusive, and authorize an action to recover the possession of the lands so admeasured. *Ib. sec.* 24.

Costs of the Proceedings.] The statute provides, that all costs and expenses arising on any proceedings on the application for the admeasurement of dower, shall be taxed by the surrogate, or a judge of the court in which the proceeding is had; and when the application is made in the Supreme Court, and also when made to a Surrogate or County Court, or the Court of Common Pleas of the city of New York, and no appeal shall be made from the order of confirmation, the costs and expenses shall be paid equally, the one half thereof by the widow, and the other half by the adverse party, 2 *R. S.* 492, *sec.* 25; *and see sec.* 24 *supra.*

The costs, if the proceedings are in the County Court, or the Surrogate's Court, are to be taxed at the rate allowed for such services in those courts prior to the adoption of the Code, *Code*, § 471; 1 *Brad. R.* 37; but if the proceeding is in the Supreme Court or Court of Common Pleas of the city and county of New York, the costs are allowed in the discretion of the court, and when allowed are to be taxed at the rate allowed for similar services in civil actions. *Laws of* 1854, *p.* 592, *post, note at end of this chapter.*

If an appeal is taken, then the costs must be paid by the party applying for the admeasurement. And if, on such ap-

peal, the admeasurement be affirmed, the Supreme Court, in awarding costs, will require the party appealing, to pay the one half of such costs and expenses, if he have not before paid the same. *Ib. sec.* 26. And in such case, the Supreme Court may also, in its discretion, award costs of the appeal, to be paid by the appellant, and to be taxed as the court shall direct. *Ib. sec.* 24. And such costs will be allowed, if there has been no fault on the part of the respondent. 2 *Hill*, 544.

It is also provided by § 318 of the Code of Procedure, which is believed to be applicable to these proceedings, that where the decision of a court of inferior jurisdiction in a special proceeding, shall be brought before the Supreme Court for review, such proceeding shall, for all purposes of costs, be deemed an action at issue on a question of law, from the time the same shall be brought into the Supreme Court, and costs thereon shall be awarded and collected in such manner as the court shall direct, according to the nature of the case. (*a*) *Code of Pro.* § 471; 6 *How. Pr. R.* 319; 14 *Id.* 527; 7 *Id.* 157; 9 *Id.* 304; *s. c.* 3 *Duer*, 616; 1 *Kernan*, 55; *Ib.* 277; *and note at the end of this chapter.*

And by chap. 270 of Laws of 1854 (*p.* 592, *sec.* 3), it is further provided that in special proceedings, and on appeals therefrom, costs may be allowed in the discretion of the court; and when allowed, are to be at the rate allowed for similar services in civil actions. Whether this provision is applicable to a proceeding for the admeasurement of dower, and if so, to what extent, has not been determined; though that proceeding is no doubt a special proceeding within the meaning

(*a*) By § 471 of the Code of Procedure, it is provided, that the second part of the Code shall not affect "appeals from surrogates' courts;" and it has been held, therefore, that appeals to the Supreme Court, from the decrees and orders of surrogates, are to be governed by the law in force previous to the Code, as well in respect to costs and fees as in other particulars; and that the second part of the Code has no application to them. 16 *Barb.* 592; 6 *How. Pr. R.* 318. But the "appeals from surrogates' courts," alluded to, are appeals to the late Court of Chancery, provided for by the Revised Statutes (2 *R. S.* 608, 609), and which were transferred by the judiciary act to the Supreme Court, and not appeals in cases of admeasurement of dower. *See post, note at the end of this chapter.*

of the statute. (*a*) *See Code of Pro.*, §§ 1, 2, 3; 1 *Kern.* 55; *Ib.* 277; 2 *Id.* 406; 12 *How. Pr. R.* 99; *s. c.* 2 *Abb. Pr. R.* 368; 14 *How. Pr. R.* 529.

(*a*) As frequent reference will be made to the act of 1854, in the subsequent chapters of this work, it is inserted entire at the end of this note; also the several sections of the Code therein referred to.

The practice upon the several subjects of appeals, and of costs, in special proceedings, and of costs on appeals, in special proceedings, will be found to be somewhat complicated, if not involved in considerable doubt and uncertainty.

Thus, the act of 1854 seems to be confined to special proceedings within the courts therein mentioned, viz., the Supreme Court, and the Superior Court, and Court of Common Pleas of the city of New York; and if so, the practice in the particulars mentioned, in special proceedings in the county courts, and the recorders' and mayors' courts of cities, and other local courts, in cases where those courts have jurisdiction, as well as in similar proceedings before justices of the Supreme Court, and other judges and officers at chambers, is left unprovided for, or to be determined by other or pre-existing statutes.

The act of 1854, also, fails to indicate the subjects included in the terms "special proceedings." Does it include proceedings for the admeasurement of dower? or proceedings upon the entry of judgment on the award of arbitrators? or proceedings as for contempts to enforce civil remedies, and the like? The courts have not yet determined these questions. They have decided, however, that under that act, an appeal lies to the general term from an order directing a mandamus to issue, 19 *Barb.* 657; and from an order confirming the report of commissioners of appraisal for lands taken for a railroad, 10 *How. Pr. R.* 168; or for a public street, 2 *Kernan*, 406; *but see* 12 *How. Pr. R.* 97, *s. c.* 2 *Abb. Pr. R.* 368; and from an order made upon the coming in of the report of referees under a reference of the plaintiff's claim against executors, or administrators, without action pursuant to 2 R. S. 88, &c. 14 *How. Pr. R.* 511. And from the best consideration which can be given to the subject, it is believed that the act applies generally to all the proceedings included in the terms "special proceedings," as defined by the Code of Procedure; and that in respect to costs, as well as appeals, it is confined to proceedings in the courts mentioned in the act, notwithstanding the general language of the second and third sections.

By the Code of Procedure, remedies in courts of justice are divided into "actions" and "special proceedings." *Code*, § 1. An "action" is defined to be an ordinary proceeding in a court of justice, by which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. *Ib.* § 2. Every other remedy is a "special proceeding." *Ib.* § 3.

Thus, an application by petition to compel a specific performance by infant heirs of a contract for the sale of land, made by the ancestor, is a special proceeding, 1 *Kernan*, 52; and so, of an application for the appointment of commissioners to appraise lands, *Id.* 277; and an application in proceedings to assess damages on the laying out of a plank road, under chapter 210 of the Laws of 1847, 3 *Code R.* 148; and in proceedings for a mandamus, 19 *Barb.* 657; and

in proceedings against a party as for a contempt to enforce a civil remedy, 9 *How. Pr. R.* 304; *s. c.* 3 *Duer*, 616, and the like; 7 *How. Pr. R.* 157; 10 *Id.* 170; 12 *Id.* 532; 14 *Id.* 511; *Id.* 527; 12 *Id.* 97; *s. c.* 2 *Abb. Pr. R.* 368; 2 *Kernan*, 406, 409. And see, also, as to what is a special proceeding, or a special case, 2 *Kernan*, 593, reversing 17 *Barb.* 506; 23 *Barb.* 88; 6 *Abb. Pr. R.* 86; 16 *New York R.*, 82.

Again—do the provisions of the Code of Procedure, relating to costs in actions, and to appeals and costs on appeals in actions, apply to costs in special proceedings, and to appeals and costs on appeals in special proceedings, in cases other than those provided for by the act of 1854?

It seems settled, that in respect to appeals to the Court of Appeals, in special proceedings, the provisions of the Code apply, and that the proceedings and costs upon the appeal are to be regulated by those provisions. *Code of Pro.* §§ 8, 11, 323, 333; 9 *How. Pr. R.*, 304; *s. c.* 3 *Duer*, 616; 2 *Sand. S. C. R.* 740, per Mason, J.

But whether the provisions of the Code, respecting the proceedings upon appeals, and costs on appeals from the County Court, or other subordinate court, to the Supreme Court, in actions, are to apply to the like proceedings and costs, in special proceedings in the same courts, and in what cases, if any, must be determined by § 471 of the Code of Procedure, in connection with the statutory and other provisions, therein excepted from the operation of the second part of the Code. See, also, as bearing on the question, §§ 8, 323, and 457 *of the Code of Procedure;* and see 9 *How. Pr. R.*, 304; *s. c.* 3 *Duer*, 616, per Duer, J.; 2 *Sand. S. C. R.*, 740; 24 *Barb.*, 149; 13 *How. Pr. R.*, 400, per Harris, J.; 4 *Id.* 432; *Laws of* 1847, *p.* 324, *sec.* 17.

By § 471 of the Code, it is provided that "the *second part* of this act shall not affect proceedings upon mandamus or prohibition; nor appeals from Surrogates' Courts; nor any special statutory remedy not heretofore obtained by action; nor any existing statutory provisions relating to actions, not inconsistent with this act, and in substance applicable to the actions hereby provided; nor any proceedings provided for by chapter five of the second part of the Revised Statutes, or by the sixth and eighth titles of chapter five, of the third part of those statutes, or by chapter eight of the same part, excluding the second and twelfth titles thereof, or by the first title of chapter nine of the same part; except that, when in consequence of any such proceeding a civil action shall be brought, such action shall be conducted in conformity to this act; and except, also, that where any particular provision of the titles and chapters enumerated in this section shall be plainly inconsistent with this act, such provision shall be deemed repealed."

The subjects considered in the first, second, third, fourth, fifth, sixth, tenth, and thirteenth chapters of this work, are among the subjects included in the "titles and chapters" enumerated in the above section. The subjects of the remaining chapters (except chapter seven), are also excepted by that section from the operation of the second part of the Code; but they are not among the subjects embraced in the "titles and chapters" specifically enumerated in the section; and, therefore, the latter part of the section, providing that "where any particular provision of the titles and chapters enumerated in this section

shall be plainly inconsistent with this act, such provision shall be deemed repealed," has no application to the subjects of those chapters.

The observations made by Barculo, J., in *Traver* vs. *Traver* (3 *How. Pr. R.* 356; *s. c.* 1 *Code R.* 112), in respect to the true principles applicable to these titles, are pertinent and valuable, and throw much light upon the subject. "Where the title *creates* the proceeding (he observes), and contains full directions as to the form and mode of conducting it, or where the title modifies a common-law remedy, so as to make it essentially new and statutory; in such cases the right and remedy remain unseparated and unaltered. But where the titles merely provide for proceedings *preliminary* to an action, or establish certain principles of law or rules of evidence, to govern suits between certain parties under certain circumstances, without materially affecting the form of the action or manner of conducting it in other respects; there the proceedings are retained and applied to the new system, and the action, not *depending* upon the old statute, is to be conducted in conformity with the Code." And the learned justice placed in the latter class the statutes in relation to suits by poor persons, and suits by and against administrators, and suits fixing the damages for trespass in certain cases, &c., "which do not seriously affect the forms of action, but are as applicable to the new system as the old." And in the former class, he placed proceedings in partition,* proceedings against corporations in courts of law, proceedings for the admeasurement of dower, forcible entries and detainers, and the like; "all of which (he observes), are either entirely creatures of the statute, by which the right and remedy are made inseparable, or are common-law actions, so far modified by the statute as to be inconsistent with any other general form of remedy." And see, also, the following authorities, illustrating the effect of § 471 upon the several subjects excepted from the operation of the second part of the Code: 6 *How. Pr. R.*, 179; *Id.* 318; *Id.* 348; 7 *Id.* 127; 9 *Id.* 304; *s. c.*, 3 *Duer*, 616; 10 *How. Pr. R.* 5; *Id.* 217; *Id.* 487; 11 *Id.* 29; *Id.* 83; *Id.* 89; *Id.* 186; 1 *Parker's Cr. R.* 169; 2 *Brad. R.* 224; 2 *Abb. Pr. R.* 12, 16, 17; *Id.* 20; 5 *Id.* 212; 15 *Barb.* 613; 1 *Selden*, 383; 1 *Duer*, 512; 2 *Id.* 632; 3 *Sand. S. C. R.* 665.

It will be found to be difficult to lay down any general rule in respect to the application of the provisions of the Code of Procedure, relating to appeals to the Supreme Court, to appeals in special proceedings, though it is believed that the Code applies, in such cases, where the proceeding partakes of the character of an action, and an appeal from the judgment therein was allowed under the former system; or where the judgment appealed from is a judgment upon which, under the former system, a writ of error would lie. In such cases, the writ of error being abolished, an appeal under the Code is substituted in its place, or the proceeding being in the nature of an action, and an appeal from the judgment being allowed, the appeal is regulated by the Code of Procedure, the same as appeals in actions. *See Code of Procedure*, §§ 8, 344 *to* 348, 471; 2 *Sand. S. C. R.* 740, per Mason, J.; 3 *Duer*, 616, *s. c.* 9 *How. Pr. R.* 304, per Duer, J.; 12 *Id.* 400, per Harris, J.; 24 *Barb.* 149.

And in the case of a judgment or final order made by the county court, or

* By the amendment made to § 471, in 1849, title "three" of part third, chap. five, of the Revised Statutes, relating to the partition of real estate, was stricken out. See *post*, Chap. IX.

other subordinate court, in a special proceeding, the review of which is not provided for by the act of 1854, or by the Code of Procedure, and in like cases before a judge or magistrate at chambers, the review is now by certiorari or by appeal to the Supreme Court, in the same cases where a certiorari or an appeal to the Court of Chancery, or to the Supreme Court, was proper under the former system; and is regulated by the same practice. *See Laws of* 1847, *p.* 324 *sec.* 17; *Equity Rules*, 1847, *No.* 81; 4 *How. Pr. R.* 432; 2 *R. S.* 491, *sec.* 19; *Id.* 516, *sec.* 47; *Id.* 573, *sec.* 69; *Id.* 510, *sec.* 19.

On the subject of costs, the same difficulty exists, though it is believed that the Code of Procedure, in cases not provided for by the act of 1854, is to apply, where the proceeding partakes of the character of an action, and also in all cases of appeals in special proceedings where the Code is to apply to the proceedings upon the appeal. *Code of Pro.* §§ 8, 11, 333, 323; 9 *How. Pr. R.* 304, per Duer, J.; *s. c.* 3 *Duer*, 616; 2 *Sand. S. C. R.* 740, *and other cases supra.* In all other cases the costs are in the discretion of the court; and when allowed, the rate prescribed by the revised and other statutes, in existence when the Code took effect, will regulate the amount to be recovered. *Id. ibid.*; 2 *Monell's Pr.* 60.

In respect, however, to costs on the review of a decision of an inferior court, in a special proceeding, it is provided by § 318 of the Code of Procedure, that when such a decision "shall be brought before the Supreme Court for review, such proceedings shall, for all purposes of costs, be deemed an action at issue on a question of law, from the time the same shall be brought into the Supreme Court, and costs thereon shall be awarded and collected in such manner as the court shall direct, according to the nature of the case." This section has been held to apply to a common-law certiorari, removing into the Supreme Court for review, a proceeding on an application under the statute in relation to the relief and support of indigent persons, 7 *How. Pr. R.* 154; and also, to a certiorari removing into the Supreme Court the decision of referees appointed to hear and determine an appeal from an order made by commissioners of highways. 14 *Id.* 527. It is believed to apply, also, to proceedings by certiorari to review the decisions of subordinate courts, and to appeals from subordinate courts to the Supreme Court, generally, in cases where a certiorari or an appeal is authorized, and no provision is otherwise made for the costs of the review. *See* 9 *How. Pr. R.* 304, *per Duer, J.; s. c.* 3 *Duer*, 616; 6 *How. Pr. R.* 179; *Id.* 319. But it does not apply to appeals from a surrogate's court, 16 *Barb.* 590; 6 *How. Pr. R.* 318; except, however, as we have seen, to appeals from that court in proceedings for the admeasurement of dower. *See, ante, p.* 15, *and note.*

ACT OF 1854, CHAP. 270, P. 592.

"*An Act in relation to special proceedings.*

"§ 1. An appeal may be taken to the general term of the Supreme Court or the Superior Court, or Court of Common Pleas of the city of New York, from any judgment, order, or final determination made at a special term of either of said Courts in any special proceeding therein; such an appeal, however, shall not stay the proceedings unless the Court, or a Judge thereof, so order, which order may be upon such terms, as to security or otherwise, as may

be just; such security not to exceed the amount required on an appeal to the Court of Appeals. (10 *How. Pr. R.* 168; 12 *Id.* 97; *s. c.* 2 *Abb. Pr. R.* 368; 14 *How. Pr. R.* 511; 2 *Kernan*, 406; 19 *Barb.* 657.)

"§ 2. Sections three hundred and twenty-seven, three hundred and twenty-nine, three hundred and thirty, and three hundred and thirty-two, of the Code of Procedure, shall apply to appeals in special proceedings.

"§ 3. In special proceedings, and on appeals therefrom, costs may be allowed in the discretion of the court, and when allowed shall be at the rate allowed for similar services in civil actions; and all appeals heretofore had or taken, and undetermined in special proceedings, shall be as valid and effectual as though had or taken under the provisions of this act.

"§ 4. This act shall take effect immediately."

The following are the sections of the Code of Procedure alluded to in the above statute:

"§ 327. An appeal must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same or some specified part thereof. When a party shall give, in good faith, notice of appeal from a judgment or order, and shall omit through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just.

"§ 329. Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.

"§ 330. Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.

"§ 332. The appeal allowed by the fourth chapter of this title must be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing."

CHAPTER II.

ARBITRATIONS.

Arbitration is the hearing and determination of a cause between parties in controversy, by a person or persons chosen by the parties. The act by which such parties refer the matters in controversy, is called a *submission;* the person to whom the reference is made, an *arbitrator;* and his decision, an *award.* An *umpire* is a third person selected by the parties, or by the arbitrators, to decide the matters in controversy, when the arbitrators have failed to agree. His decision is termed an *umpirage*, or *award.*

An essential characteristic of an arbitration is, that the matters in controversy shall be submitted to the arbitrators for the purpose of final determination. The reference of a collateral fact, or the submission of a particular question, forming only a link in the chain of evidence, is not calculated to put an end to controversy; it barely substitutes the judgment of the arbitrators in the place of evidence on the collateral or particular matter submitted, leaving the controversy open. A reference, therefore, of such a matter, is not treated by the courts as a proper submission to arbitration. 5 *Wend.* 522, *and note;* 9 *Id.* 661; *and see* 2 *R. S.* 541, *sec.* 1, *post.*

The first legislative provision adopted in this State on the subject of arbitrations, was passed Feb. 28, 1791. That act was substantially the same as the act of 9 and 10 Will. III. from which it was taken. 17 *Wend.* 413. It was continued in the subsequent revisions of the statutes, and may be found

in the Revised Laws of 1802 and 1813, in the same form in which it was originally passed. 1 *R. L.* 1802, *p.* 156; 1 *R. L.* 1813, *p.* 125; *and see amendments to same in Laws of* 1816, *p.* 242, *and Laws of* 1824, *p.* 285.

The Revised Statutes of 1830, which are herein considered, essentially varied and improved the previous statutes, and introduced a system of law and practice on the subject in many respects new, and which was intended to be complete of itself. They specify the matters which may be submitted to arbitration, the manner in which the submission shall be made, and the proceedings on the arbitration. They also authorize judgment to be entered on the award, with costs, and execution or process of contempt to issue for the enforcement of the same. By which means "the parties will be saved the necessity of an expensive and perplexing action, on the bond or the award; and the object of the statute 'to contribute much to the ease of parties, in determining their differences,' as expressed in its preamble, will be more effectually obtained." *Rev. Notes*, 3 *R. S. 2d ed.* 774. Provision is also made by which the award, in the cases specified in the statute, may be vacated, modified, and corrected; and where judgment is entered upon it, the parties may have the same reviewed by appeal, the same as in actions. *Ib.; and see post.*

The right of parties to submit their matters to arbitration, at the common law, still exists notwithstanding the statute. 15 *Wend.* 99; 2 *Hill.* 273, *note.* How far the provisions of the statute apply in such cases, is not fully settled by the authorities. The better opinion, however, is, that in all cases where the submission is in writing, the provisions of the statute, except those relating to the powers of the court to vacate and to modify the award, and to the entry of judgment thereon, apply to the arbitration, notwithstanding that the submission does not authorize a judgment to be entered upon the award. 4 *Denio*, 347; 5 *Paige*, 575; 4 *Coms.* 159; 15 *Wend.* 103. And all the provisions of the statute apply to those cases, only, where the submission is in writing, and authorizes a judgment to be entered upon the award made pur-

suant to it. 20 *Barb.* 482. But where the submission is by parol, the statute has no application. In such case, it is an arbitration at the common law. It being settled that a parol submission is valid, the doctrine is to be carried out in all its legitimate consequences. When the parties do not begin under the statute, the subsequent proceedings can neither be aided nor injured by the statute. 4 *Denio*, 348, per Bronson, J.; and see 5 *How. Pr. R.* 315; 15 *Wend.* 99; 2 *Barb. Ch. R.* 437; 2 *Hill*, 271.

What Matters may be Submitted.] The statute provides that all persons, except infants and married women, and persons of unsound mind, may submit to the decision of one or more arbitrators, any controversy existing between them, which might be the subject of an action at law or of a suit in equity, except in the cases therein otherwise provided. 2 *R. S.* 541, *sec.* 1. The submission of all matters in difference, or of certain matters, only, within the meaning of this section, must be understood as limited to existing controversies, and cannot be construed to authorize an award upon any matter arising subsequently to the submission. 4 *Denio*, 252, per Beardsley, J.

But no such submission shall be made respecting the claim of any person to any estate in fee, or for life, to real estate; any claim, however, to an interest for a term of years, or for one year or less, in real estate, and controversies respecting the partition of lands between joint tenants, or tenants in common, or concerning the boundaries of lands, or concerning the admeasurement of dower, may be submitted to arbitration. 2 *R. S.* 541, *sec.* 2.

The Revisers, in introducing the section last mentioned, remark: "The old law certainly was, that freehold or inheritance of lands could not be determined by arbitrament. 1 *Roll.* 242, *L.* 10; *Comyn's Arbitrament*, *D.* 3. And although it has been qualified in modern times (3 *East*, 11; 15 *Johns. R.* 197), by saying that the award cannot operate *to transfer the title*, but merely to estop the parties, yet it is conceived, that this is only calculated to mislead those who may

wish to resort to an arbitration to determine their titles. Besides, on principles of public policy, it is believed that such controversies, which always involve intricate legal questions, ought not to be thus determined. The exceptions stated, embrace the cases which seem to require it, and which have been most usually presented to the courts." *Rev. Notes*, 3 *R. S.*, 2*d ed.* 774. *See also* 15 *Barb.* 645; 20 *Id.* 488, *Cow. and Hill's Notes to Phil. Ev.* 1037; *Cald. on Arb.* 1, 2.

The prohibition of the statute against the submission to arbitration of claims to an estate in lands, applies only where the controversy relates to the legal title, and not where the equitable title only is in dispute. A party who seeks the specific performance of an agreement to convey lands, or damages in lieu thereof, does not make a claim to an estate in fee, within the meaning of the statute; he is merely seeking the performance of an agreement, or a compensation if such agreement cannot be performed. And, therefore, where a suit was pending, and the relief sought was a specific performance in respect to lands of which the title was admitted to be in the defendant, or damages, it was held that the matters in issue in such suit were properly submitted to an arbitrator, and that his award was binding. 15 *Barb.* 644, *aff.* 4 *Kernan*, 32. "The claim to an estate of any particular description in lands," says T. A. Johnson, J., "is a claim that such estate is in the claimant, and the decision upon it would necessarily determine whether the estate was in the claimant or not. The terms, estate in fee, or for life, import legal estates only. They have a precise and definite legal signification, to which they are to be confined in giving construction to this statute. This was the kind of claim, the submission of which was intended to be forbidden." 4 *Kernan*, 39, *supra.*

A religious corporation, not having the power to sell its real estate without the consent of the court, cannot submit to an arbitrator the question whether such real estate shall be sold; and where, in such case, an arbitrator was chosen and decided that the property should be sold, it was held that his award was not binding upon any one, and that it conferred no authority to make the sale. 23 *Barb.* 327; *s. c.* 4

Abb. Pr. R. 182. Nor will corporators be bound by the submission to an arbitrator, of the question who are the legally elected trustees of the corporation; and an award under such a submission, cannot legally determine that question. *Id. ibid.*

A single item of a long account may be submitted to arbitration, and the award, if regular, will be valid as to the subject submitted. 1 *Wend.* 326. But the reference of a collateral fact, or of a particular question, forming only a link in the chain of evidence, is not a proper subject of submission to arbitration. 5 *Id.* 522, *note;* 9 *Id.* 661.

And an agreement by which the members of an association (*e. g.*—a Lodge of the Independent Order of Odd Fellows), undertake to confer judicial powers, in respect to the property in which they have a common interest, upon a body of men or officers, to be from time to time selected out of the association at large, as a tribunal having general authority to adjudicate upon alleged violations of the rules of the association, and to decree a forfeiture of the rights to such property, of the parties adjudged to have been guilty of such violation, is void. And the courts will not aid in enforcing the judgment of a tribunal sought to be created by private compact, except in cases of a submission to arbitration of specific matters of controversy. 16 *New York R.* 112.

Who may Submit to Arbitration.] All persons, except infants and married women, and persons of unsound mind, may enter into an agreement to submit to arbitration. 2 *R. S.* 541, *sec.* 1; 5 *Wend.* 20. And see as to who are the proper parties to a submission at the common law, *Cald. on Arb.* 7 *to* 15.

Generally, where there is a capacity to contract, with a liability to pay, there is a power to arbitrate. 1 *Barb. S. C. R.* 584. A corporation, therefore, may legally submit a question to arbitration. *Ib.* 590.

And so, the guardian of an infant may submit a claim to arbitrators on behalf of his ward; and a performance of the

award will be a bar to a suit by the infant when of age for the same matter. 3 *Cai. R.* 253. Where a claim was submitted to arbitration by an infant, and an award afterwards made in his favor, and the money awarded to him, paid to his guardian, his settlement with the guardian in relation to the claim, on his attaining his majority, was held to be an affirmance of the award, and a bar of the claim. 4 *Selden*, 231. And the omission, in that case, to enforce the original claim for two years after the infant's arrival at full age, was held to be an acquiescence in the submission and award. *Ib.*

An attorney, it seems, has authority, as such, to submit a matter to arbitration, for his client. *See Cow. & Hill's notes to Phil. Ev.* 1034. And if this were not so, yet the objection would be waived by the client's personally participating in the proceedings upon the hearing before the arbitrators. 2 *Hill*, 271.

Where the submission is entered into by an agent or attorney, it should be in the name of the principal; otherwise the agent or attorney would be personally liable, 5 *Hill*, 419. And so, also, a person would be liable if he enter into a submission on behalf of himself and others, but without their authority. *Ib.*

One of several partners has no authority, without the assent of his co-partners, to refer to arbitration any partnership interest or controversy, 13 *Barb.* 660; and this, too, whether the submission is by simple agreement, or by speciality. *Ib.* And where, in such case, a submission was entered into by one of the partners, in the firm name, without the consent of the co-partners, the submission was held to be valid as to him, but void as to the co-partners. *Ib.; and see* 1 *Wend.* 326; 3 *Kent's Com.* 49; 15 *Barb.* 524.

The Arbitrators and Umpire.] The parties to the controversy may select such persons as arbitrators, as they may think proper. They, alone, are to judge of the fitness and competency of those to whom are delegated the authority to determine the matters in dispute. And, therefore, the submission would be valid, even though the arbitrators selected

are persons whose want of capacity or defect of character is notorious (*Cald. on Arb.* 37; *Roll. Arbit. A*); and though they should be interested in the result of the controversy, or closely connected with one of the parties. *Ib.* Though if these objections to the arbitrators were unknown to the parties at the time of their appointment, or such interest or relationship, or other incompetency, arose, or was discovered, subsequently, it would be different, and relief would no doubt be afforded to the party injured. *Ib.; and see* 1 *Barb. S. C. R.* 336; 2 *Vern.* 251.

Where arbitrators have made an award which is void, a party has the right to consider the power conferred upon them as virtually annulled, and to call for the selection of new arbitrators. He is not bound to renew the investigation before arbitrators who have already formed and expressed an opinion. 1 *Barb. S. C. R.* 326, 336.

The arbitrators will not be permitted to contradict their award (3 *Paige*, 124; 12 *Wend.* 212); nor to give evidence tending to impeach it. 1 *Barb. S. C. R.* 326; 20 *Id.* 482; though their testimony may be received, when fraud is not alleged, to show that they did not take a particular subject matter into consideration (1 *Barb. supra*), and that matters were included in the award which were not embraced in the submission. 20 *Id.* 410. But the rule that arbitrators are not permitted to give evidence to impeach or contradict their award, does not apply to arbitrators whose powers have been terminated by the appointment of an umpire, by whom the award is made. 1 *Barb., supra.*

Where matters in difference are referred to more than one arbitrator, it is usual to provide in the submission that some other person shall ultimately decide upon them, in case the arbitrators should be unable to agree. *Cald. on Arb.* 38. Such person is called an *umpire;* and he may be appointed immediately by the arbitrators, without waiting until a disagreement has arisen between them. 1 *Hill*, 489; 1 *Barb. S. C. R.*, 325; 2 *Johns.* 57; 17 *Id.* 405.

The appointment of the umpire should be in writing, especially if the submission is under the statute; 23 *Wend.*

628; the most usual way is by an endorsement made by the arbitrators upon the instrument of submission. *Cald. on Arb.* 42. But if the arbitrators and umpire sit together and hear the parties and their witnesses, and all unite in making the award, the award is sufficient evidence of the appointment, unless the submission requires the appointment to be made previous to entering upon the hearing. 23 *Wend.* 631, per Walworth, Ch.

Where the submission is at the common law, and by parol, the appointment of the umpire may also be by parol. *Ib.* 628.

The authority of the arbitrators ceases on the making and delivery of the award; 4 *Coms.* 567; and also on their failure to agree, and the appointment of an umpire. 1 *Barb. S. C. R.* 325; *Cald. on Arb.* 38, 43. And if, after the appointment of an umpire, the arbitrators join with him in making the award, this will not vitiate it. The award, in such case, is to be regarded as the sole award of the umpire, and the arbitrators' signatures may be treated as surplusage. 1 *Hill*, 489; 1 *Barb. S. C. R.* 325; 4 *Duer*, 325.

And so, authority may be given to the arbitrators, in case of their disagreement, to call in a third person as arbitrator to sit with them, and hear and determine the matters in controversy. In such case, the person so called in is not an umpire, but only an arbitrator, and the proceedings thenceforth are to be conducted the same, in all respects, as if he had been appointed in the first instance, with the other arbitrators. 4 *Duer*, 318.

The Submission.] The submission is the authority given to the arbitrators, by the parties, empowering them to inquire into the matters in controversy, and to determine the same. Where the submission is in writing, it is embodied in the form of a mutual agreement between the parties, or in the condition of a bond to be executed by one to the other. For forms of each, see *Appendix*, Nos. 16 to 20.

The statute requires the submission to be in writing. 2 *R.S.*, 541, *sec.* 1. But this is not required, at the common law, except where the controversy is in relation to real estate,

or to some matter as to which it is incompetent for the parties to make a valid and binding agreement by parol. 2 *Barb. Ch. R.* 430; 2 *Hill*, 272, *note; Billing's Law of Awards*, 9; *Kyd on Awards*, 7; *Cowen and Hill's notes to Phil. Ev.* 1026. The statute has not changed the law in relation to submitting matters in controversy to arbitration, except in those cases where the parties enter into a submission in pursuance of the provisions of the statute. *Ib.*; 15 *Wend.* 104; 4 *Denio*, 347. And, therefore, a parol submission is valid; and it need not be in writing, except for the purpose of enforcing the award in the manner prescribed by the statute. 2 *Hill*, 271, *and cases supra;* 5 *How. Pr. R.* 316.

Where the submission to arbitration is by a corporation, it may be made by a resolution, or ordinance, adopted at a meeting thereof; and it need not be under its corporate seal. 1 *Barb. S. C. R.* 584.

The form of the submission is a matter of indifference. It is sufficient, if it appears from the acts of the parties, that an arbitration was intended, and that the decision of the arbitrators should have the effect of an award. *Ib.* Care must be taken, however, in drawing the submission, as it is from that that the arbitrators acquire their jurisdiction or power of deciding. The authority conferred by it must be strictly followed. 6 *Johns.* 14; 1 *Wend.* 326; 4 *Coms.* 157; 7 *Hill* 329.

Where the submission is of all demands, it includes all questions relating both to real and personal estate. 5 *Wend.*, 268; 15 *Johns.* 197; 2 *Cai. R.*, 320. And where it is general, of all causes of action, an allegation of fraud in a sale is included. 9 *Johns.* 38, 42. And see also upon the construction of submissions, 20 *Barb.* 481; 23 *Id.* 187; *Cow. & Hill's Notes to Phil. Ev.* 840; *Cald. on Arb.* 25.

It is not necessary that there should be an express agreement in the submission to abide by the award when made; for the law implies this from the fact of submission. 2 *Barb. Ch. R.* 430.

The submission is valid, notwithstanding that it does not contain an agreement that a judgment of a court of record

may be entered on the award. 4 *Coms.* 157. And where a submission purported to be made pursuant to the statute, but omitted to authorize a judgment to be entered on the award to be made; it was held that this was not a submission under the provisions of the statute. 20 *Barb.* 486, per C. L. Allen, J.; *and see* 5 *Paige*, 578; 4 *Denio*, 347.

Where the submission is under the statute, if the parties intend to authorize the arbitrators to award the costs and expenses of the arbitration, the submission should contain such authority in express terms. 4 *Denio*, 249; *and see* 13 *Barb.* 90. But if the subject of controversy is an action then pending in court, the arbitrators may award as to the costs of such action without any express authority for that purpose. 4 *Denio*, 251. And so, they may award as to the fees and expenses of the arbitrators, without such authority. *Ib.* 253.

Where the submission was by two parties on one side, and one on the other, it was held that it included not only the joint demands of the two, but their individual demands against the other party. 19 *Wend.* 285. And so, where the submission was by D. and M. on one side, and W. and his partner on the other, this authorizes the arbitrators to award against W., *alone*. 1 *Hill*, 319.

The signatures of the parties to the submission should be witnessed, especially if the submission is under the provisions of the statute. 2 *R. S.* 542, *sec.* 9.

The submission is revocable by either party at any time before the matters in controversy are finally submitted to the arbitrators for decision; subject, however, to liability to costs, expenses, and damages, which the opposite party may have incurred in preparing for the arbitration, and which he may recover by action of the party revoking. 20 *Barb.* 262; 5 *Paige*, 578; 2 *R. S.* 544, *sec.* 23; *and see post*, "Revocation of submission."

Effect of Submission.] The mere agreement to submit a cause pending in court to arbitration, operates as a discontinuance of the suit, although the arbitrators have not taken, or consented to take, upon themselves, the burden of the sub-

mission. 2 *Wend.* 505; 12 *Id.* 503; 15 *Id.* 293; 2 *Hill*, 387; 3 *Barb. S. C. R.* 275; 4 *Id.* 541; 11 *How. Pr. R.* 355. But a party may afterwards waive such discontinuance by appearing at the trial of the cause, and going on with the same. 1 *Wend.* 314. And the submission will be a discontinuance of the suit, even though it is by parol; and this, too, notwithstanding the existence of a rule of the court avoiding all agreements between parties in respect to the proceedings in a cause, unless the same are in writing; and notwithstanding, also, the provisions of the statute requiring submissions to be in writing. 15 *Wend.* 99.

But a valid submission may be made, leaving the suit still pending, provided it appears from the agreement itself that such was the intention of the parties. And, it seems, the general agreement to submit to arbitration operates as a discontinuance, merely from the implied understanding of the parties that the suit is to be no further prosecuted. *Ib.* 103, per Walworth, Ch.; *and see* 20 *Barb.* 268. But it is not a discontinuance where the parties agree that a judgment may be entered on the award. 6 *Cowen*, 399. And where, in such a case, the submission was revoked, it was held that the court might proceed with the cause to trial, notwithstanding the submission. *Ib.*

Although the agreement to submit has the effect to discontinue the suit, yet where the submission authorizes a judgment to be entered in the suit, in conformity to the award, a judgment may be entered accordingly; and such judgment will be binding on the parties as a judgment by consent. 11 *Paige*, 529; 17 *Johns.* 461; 18 *Id.* 23; 13 *Wend.* 293.

Where a party attempts to proceed with a cause after it has been submitted to arbitration, the remedy is by motion to the court to stay the proceedings, and not by plea. 2 *Hill*, 390, *and note.*

The submission of a claim to arbitration constitutes no defence or legal obstacle to an action for the same matter, if the action is commenced before the case is finally submitted to the arbitrators for decision. 20 *Barb.* 262; 4 *Sand.* 198, *aff.* 1 *Selden*, 422.

Proceedings on the Arbitration, &c.] The arbitrators selected are to appoint a time and place for the hearing, and may adjourn the same from time to time as may be necessary; and on the application of either party, and for good cause, they may postpone such hearing to a time not extending beyond the day, fixed in the submission, for rendering their award. 2 *R. S.* 541, *sec.* 3.

Before proceeding to hear any testimony, the arbitrators should be sworn, faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding. *Ib. sec.* 4. For form of oath, see *Appendix*, No. 21. Such oath may be administered by any judge of any court of record, or by any justice of the peace, or by any commissioner of deeds. *Laws of* 1843, *p.* 246. But the omission of the arbitrators to take the oath prescribed by the statute, will not invalidate the proceedings; and this, whether the proceedings are under the statute, or at the common law. 4 *Coms.* 157; *s.c.* 1 *Denio*, 440; 24 *Wend.* 258; 1 *Barb. Ch. R.* 173. Though if objection is made, previous to the making of the award, that the arbitrators should be sworn, the omission, in such case, would no doubt render their proceedings irregular. 4 *Coms.* 159; 1 *Barb. Ch. R.* 173.

The arbitrators are also to give the parties an opportunity of being heard in relation to the matters submitted. And an award made without reasonable notice of the time and place of hearing, to the losing party, and without his being present, is void. 23 *Wend.* 628, *reversing* 5 *Wend.* 516; 3 *Barb. S. C. R.* 275. For form of notice, see *Appendix*, No. 22. What is a reasonable notice is for the arbitrators, themselves, to determine; and where they act in good faith in reference to that question, their award will be sustained, although they may err as to what constitutes a reasonable notice. *Ib.* Due notice, however, will be presumed to have been given; and the party seeking to impeach the award for the want of such notice must prove that it was not given. 1 *Hill*, 489; 1 *Barb. S. C. R.* 326.

All the arbitrators must meet together, and hear all the proofs and allegations of the parties. But an award by a

majority of them will be valid, unless the concurrence of all the arbitrators is expressly required in the submission. 2 *R. S.* 542, *sec.* 7. In a case, however, which arose prior to the Revised Statutes, where three arbitrators were named in the submission, with power to any two of them to make an award, it was held, that two of the arbitrators had power to hear, where the third had been notified of his appointment and fused to attend, 2 *Wend.* 494; though it would have been otherwise, it seems, if the arbitrator, who had been notified to attend, had not been willfully absent. *Ib.* 496; *Rev. Notes*, 3 *R. S.* 2*d ed.* 775; 11 *Johns.* 402; 6 *Id.* 42; 4 *Duer*, 325. But where all the arbitrators have heard the proofs, &c., and the matter has been finally submitted to them, and they have adjourned to a fixed time to make their award, if one of them is absent at that time, the other two may proceed, and make a valid award. 3 *Sand. S. C. R.* 405. And where two of three arbitrators made the award in writing within the time, and it did not appear on the face of the award that all of them heard the proofs and allegations of the parties, it was held, that this might be shown by evidence *aliunde*. 7 *Cowen*, 290; 3 *Sand. S. C. R.* 405.

Although all the arbitrators must meet together and hear the proofs and allegations of the parties, yet it is not necessary that all should concur in the decision of every question which arises as to the admission or rejection of evidence; but it is sufficient if all actually hear the cause. 3 *Paige*, 124.

In the examination of witnesses, and in the character of the evidence received, the arbitrators have a wider latitude than courts in the trials of issues. *Caldwell on Arb.*, 52. And, in general, where the submission makes no provision on the subject, the arbitrators may receive such evidence on the hearing before them, whether material and relevant to the matters in issue or not, as they may think proper. They may, also, hear the statements of the parties themselves. And it is no ground for setting aside the decision of the arbitrators, that they have received impertinent and incompetent evidence, 21 *Barb.* 382; though, it seems, it would be otherwise if they should refuse to receive evidence which was pertinent and

material to the matters in controversy. 2 *R. S.* 542, *sec.* 10; 17 *Johns.* 406; 15 *Wend.* 519.

Witnesses.] Witnesses may be compelled to appear before the arbitrators, by subpœnas, to be issued by any justice of the peace, in the same manner, and with the like effect, and subject to the same penalties for disobedience (2 *R. S.* 240) as in cases of trials before justices of the peace. 2 *R. S.* 541, *sec.* 6. For form of oath, &c., on application for subpœna, see *Appendix*, Nos. 23 and 24.

The oaths to the witnesses and other persons examined before the arbitrators, may be administered by the arbitrators, or any of them. *Laws of* 1843, *p.* 246. But the arbitrators do not possess the power to administer the oath, except where the submission is in pursuance of the statute. 5 *How. Pr. R.* 315. For form of oath, see *Appendix*, No. 25.

The award will not be vacated because the witnesses are not sworn on the hearing before the arbitrators, where no regular objection is taken thereto at the time. *Lal. Supp. to Hill & Denio R.* 110.

The Award.] The award, to be enforced according to the provisions of the statute, must be in writing, subscribed by the arbitrators making the same, and attested by a subscribing witness, 2 *R. S.* 542, *sec.* 8. For form, see *Appendix*, No. 28. It need not be under seal unless the submission requires it to be so; and the fact that the submission is under seal, does not make it necessary to affix seals to the award. 23 *Barb.* 187. It is sufficient if the signatures of a majority of the arbitrators are attested, where a majority have the power to decide the matters submitted. 1 *Selden*, 482; 4 *Barb.* 250.

But the award, at the common law, need not be in writing, where the submission is verbal, without any provision therein that the award shall be in writing. 2 *Barb. Ch. R.* 430; *Cald. on Arb.* 131. And even where the submission, by writing, and under seal, requires the award to be in writing, subscribed by the arbitrators, this may be waived by the parties, by parol; and a verbal award, afterwards made, will be binding on both. The agreement for the parol award, in

such case, operates as a new submission, and the parties are estopped from saying that the parol award, made in pursuance of their directions, is void. 20 *Barb.* 481; *and see* 1 *Hill*, 321.

It is sufficient if the award is made by a majority of the arbitrators, unless the concurrence of all of them is expressly required in the submission. 2 *R. S.* 542, *sec.* 7. But the rule is the reverse where the submission is by parol, at the common law, in which case the award must be made by all the arbitrators, unless the submission otherwise provides. 6 *Johns.* 39; *Cowen & Hill's Notes to Phil. Ev.* 1030. And the statute has not changed the rule in this respect. 4 *Denio*, 347.

Any form of words which amounts to a decision of the questions submitted, is good as an award. Technical expressions are not necessary, nor technical precision and certainty, nor any introductory recitals. *Russ. Arb.* 244; 1 *Hill*, 489; 1 *Selden*, 482; 4 *Barb.* 250. If the award is expressed in such language that men of ordinary intelligence, acquainted with the subject-matter, can understand it, that is sufficient, no matter how short and elliptical the phraseology may be. *Id. ibid.* And so, the form of the award is a matter of indifference; the court will look at the proceedings in order to collect the intent. 23 *Wend.* 363; *and see* 12 *Id.* 156; 11 *Johns.* 103; 14 *Id.* 368. And where the award is ambiguous, the subject-matter to which it relates may be identified by parol. 1 *Hill*, 489, *supra.* And so, where it is indefinite as to the subjects investigated and determined, parol evidence will be received to show whether the arbitrators have exceeded their authority. 1 *Barb. S. C. R.* 326; 20 *Id.* 410; 7 *Hill*, 329.

But where, by the terms of the submission, the award is to be made by the arbitrators in a particular form, the award is not made and ready for delivery until that form is complied with; as, where it is to be attested by a subscribing witness, and this is not done (5 *Paige*, 575); or, where it is to be in writing, under the hands and seals of the arbitrators, and the award is in writing, but not under seal (6 *Johns.* 133); or, where the award is to be in writing, under the hands of the arbitrators, and it is in writing, but not signed. 10 *Id.* 147, *note.*

Where the concluding part of the condition in the bond of submission is thus: "so as the said award, &c., be made in writing, &c., and ready to be delivered to the parties on or before," &c.,—these import a limitation upon the power conferred upon the arbitrators, the observance of which is essential to their jurisdiction. (*a*) 1 *Hill*, 321; 3 *Barb. S. C. R.* 57. And, therefore, where the award was required to be in writing ready for delivery to the *parties* on or before a given day, and the award was made and delivered to the prevailing party, but not to the other party; it was held that the award was a nullity. 1 *Hill*, 321, *supra;* 6 *Johns.* 14. The arbitrators, in such case, should execute and deliver two parts, unless the party shall, in some form, expressly discharge them of that necessity (*Ib.*; 10 *Johns.* 144; 15 *Id.* 197); as by telling them that they need make no counterpart, for he will not receive it; or, by the acceptance of a sworn copy of the award in lieu of the original. *Id.;* 1 *Hill*, 322, *supra; and see* 20 *Barb.* 481.

Where the parties submit all their demands to arbitration, it is no objection to the award that a particular matter, thus submitted, was not laid before the arbitrators. 23 *Barb.* 188; 1 *Selden*, 486. The parties are bound to claim before the arbitrators all demands coming within the scope of the submission. *Ib.*

In ascertaining the amount to be awarded, the arbitrators are not limited to the penalty of the arbitration bond. The penalty is only regarded where the submission is revoked, and an action is brought upon the bond for damages. 7 *Cowen*, 522.

As we have seen, the arbitrators, where the submission is under the statute, are not authorized to award against a party the costs and expenses of the arbitration, unless the submission, in express terms, authorizes it (4 *Denio* 249); though

(*a*) As to the effect upon the award of an omission to comply with the *ita quod* clause, or other condition in the submission, so far as it relates to the form of the award, the subject-matter submitted, the time within which the award is to be made, &c., see *Cowen & Hill's Notes to Phil. Ev.* 1027 *to* 1030. And see as to when the award operates as a bar to a suit for the same matter. *Ib.* 840, 1026, 1040.

this would be otherwise, it seems, if the submission was at the common law. 14 *Johns.* 161; 2 *Cowen*, 651; 22 *Wend.* 128; but see *contra*, per Beardsley, J., 4 *Denio*, 251, and cases cited; and see 13 *Barb.* 90, per Harris, J. But if the subject of the controversy is an action then pending in court, the arbitrators may award as to the costs of such action, without any express authority for that purpose. 4 *Denio*, 251. And so they may award as to the fees and expenses of the arbitrators, without such authority. *Ib.* 253.

It must be made within the time, &c.] The award must be made within the time required by the submission. *Kyd on Awards*, 96. It cannot be made afterwards, unless the time is extended. *Ib.* And where the time is extended, an award made within the extended time is as valid and decisive of the rights of the parties, as if made within the time originally specified. 5 *Paige*, 575. The agreement extending the time should be in writing; though it need not be under seal, even though the submission is under seal. *Ib.*

If no time is specified in the submission within which the award is to be made, it may be made at any time, 22 *Wend.* 126; but in such case, it is the duty of the arbitrators, at the request of either party, to proceed within a reasonable time. 6 *Verm. R.* 666; *Cow. & Hill's Notes to Phil. Ev.* 1029.

Where the award bore date on the day after the time within which it was to be made, according to the submission, and it was not delivered until the day of its date, and there was no other evidence as to when the award was actually made, it was presumed, in such case, that the arbitrators performed their duty and had the award ready within the time fixed; and the mere date at the end of the paper is not enough to establish the contrary. 23 *Barb.* 187.

But arbitrators are not bound to deliver the award until their fees are paid. And when an award is ready to be delivered on payment of the fees of the arbitrators, it is ready to be delivered to the parties within the legal meaning of a provision in the submission requiring it to be made and ready to be delivered within a certain time. 3 *Barb. S. C. R.* 57.

It must be certain and final.] The award ought to be certain, and to be expressed in such language that no reasonable doubt can arise upon the face of it, as to the meaning and intention of the arbitrators, or as to the nature and extent of the duties imposed by it on the parties. Thus, where an award directed one of the parties to give security, without specifying what that security should be; it was held void for uncertainty. 8 *Cowen*, 235; 9 *Johns.* 43. And so, of an award which requires a party to finish "the house," or to pay for "the stove," without specifying the house or the stove that is meant. 2 *Cai. R.* 235. And so, where the award directs the costs of the arbitration to be paid, without stating the amount thereof. *Ib.* And so, of an award directing a farm to be delivered to one of the parties, where it does not appear what farm is intended. 3 *Cowen*, 72; *see, also*, 12 *Wend.* 377.

But certainty to a common intent, consistent with fair and probable presumption, is all that is required. 14 *Johns.* 96. Where the subject-matter of a suit was submitted to arbitration, and an award was made that "the said suit shall be no further prosecuted," this was held sufficient. 3 *Cai.* 304. And so where it was submitted to arbitrators to determine the value of land to be taken for a railroad across the farm of one of the parties, and the damages which the owner would sustain by reason of the road crossing it, an award is sufficient if it state the whole amount to be paid for the land and the damages; and it need not state the value of the land and the amount of damages, separately. 4 *Selden*, 160. And so, also, an award that a party has sustained damages to an amount which is therein specified, is sufficient, without directing the payment of the damages so assessed. 16 *Barb.* 576. And so an award directing a specific sum to be paid by one party to the other, is sufficient without requiring a release to be executed. 5 *Wend.* 268. And where, in such case, the award directed that if any errors were found in the calculation, on proof thereof, the party to whom the money was paid, was to refund the amount thereof, this was held final and sufficient. 2 *Johns.* 57; 13 *Id.* 27.

Where the award refers to certain extrinsic circumstances,

it is sufficiently certain. 14 *Johns.* 96; 2 *Hill*, 75; 23 *Barb.* 187. Thus, where the submission is between partners, an award that one of the partners shall have and own in his own right, all the interest which the partners jointly had in a certain brewery, near the village of P., cannot be objected to for uncertainty. 5 *Wend.* 268. And if there is nothing on the face of the award showing that it may not be rendered certain by matter extrinsic, the intendment will be that it is certain, until the contrary is shown. 2 *Hill*, 75.

Where a suit is submitted to arbitration, it is not sufficient that the arbitrators determine the amount of damages to be paid; with the costs, but they should direct the suit to be discontinued; otherwise, it seems, their award is not final. 14 *Johns.* 302; *but see* 1 *Hill*, 69. And where the award directs money to be paid, as the price or value of certain stock, it seems it should also provide for a transfer of such stock. 4 *Denio*, 195, per Bronson, J.; *and see* 2 *Cowen*, 649.

But where the award finds due to a party a sum of money, it is not indispensable that it should state in words or figures the precise amount thereof. It is sufficient, if nothing remains to be done in order to render the award certain and final, but a mere ministerial act, or an arithmetical calculation. 23 *Barb.* 187; 12 *Wend.* 380.

When the submission merely authorizes the arbitrators to determine the amount due to one of the parties, they are only authorized to ascertain and fix that amount; and have no right to impose any condition upon the payment of it. 1 *Barb. S. C. R.* 326.

When the Award is void, in whole or in part.] It is from the agreement of submission that the arbitrators derive their power to decide upon the matters in controversy. It is that which gives them jurisdiction; and the authority conferred by it must be observed. 6 *Johns.* 14; 7 *Hill*, 329.

If the submission is made conditional by the *ita quod* clause, and recites several distinct matters which are specifically submitted, and the arbitrators omit to decide one of the matters, and there are no general words in the award which can

be construed to embrace a decision on such matter, the whole award will be void. 1 *Selden*, 485, per Paige J., *and cases cited*; 5 *Cowen*, 199; 14 *Johns.* 96. Where the submission containing the *ita quod* clause, is general, but the decision of the arbitrators applies in terms only to a particular matter, the award, if it purports to be made concerning the matters submitted, will be good, unless it is shown that there were other matters brought before the arbitrators which they neglected or refused to decide. *Id. ibid.* But if the arbitrators award in relation to one or more things, and say that they will not meddle with the rest, or omit to do so after notice of the same, the whole is void; because they have not pursued their authority; and in such case it is immaterial whether the submission was general or special. 5 *Cowen*, 199; 4 *Duer*, 133; *Kyd on Awards*, 174; *Wat. on Arb.* 121, *and cases cited.*

If the arbitrators pass upon the matters submitted, and also include in their decision another matter not submitted, the latter may be rejected, and the award will still be good as to the residue. 4 *Comstock*, 567; 15 *Barb.* 525; 1 *Hill*, 490; 1 *Wend.* 326; 1 *Cowen*, 117; 2 *Id.* 628; 13 *Johns.* 264; 10 *Id.* 164. But the award will be void in case the matters properly decided, cannot be ascertained and separated from those not submitted. *Id. ibid.;* 1 *Barb. S. C. R.* 326; 20 *Id.* 410. And a separation will always be made, if possible. 1 *Hill*, 490.

And so, if that part of the award which is void, is so connected with the rest as to affect the justice of the case, the award is void for the whole. Thus, where it directs the performance of acts by both parties, and the award as to the acts to be done by one of the parties is void, and the void part is the consideration of the thing awarded on the other side, the whole award fails. 22 *Wend.* 126; 3 *Cowen*, 70. And so, also, though the award may be bad in part, yet it may be good in part, if there is no connection between the two subjects, and they do not depend upon each other; as, where the award directs money to be paid, or security to be given, though it is void as to the security, being uncertain in not specifying what the security shall be, yet it is good as to the money.

8 *Cowen*, 235; 9 *Johns.* 43; *and see* 1 *Cowen*, 117; 13 *Johns.* 265.

The Award is a Bar to an Action for the Same Matter.] A valid award is a bar to a suit for the original cause of action (2 *Seld.* 44); and this, too, although the award has not been performed (2 *Kern.* 9), and though it was made in pursuance of a parol submission. *See* 15 *Wend.* 99; 2 *Hill*, 272, *and note.* And so, a submission to arbitrators of the subject-matter of a pending suit, and an award thereon, puts an end to the suit. 1 *Hill*, 69.

When the submission is general, of all demands which either party has against the other, the award is a bar to an action for any demand existing at the time of the submission; and evidence to show that the demand for which the action is brought was omitted by mistake to be laid before the arbitrators, or was not considered or decided by them, is inadmissible. 12 *Johns.* 311. "It would be a dangerous precedent," says the court, "to allow a party, on a submission so general, intended to settle everything between the parties, to lie by, and submit only part of his demands, and then institute a suit for the part not brought before the arbitrators. The object of the submission was, to avoid litigation; and neither party is at liberty to withhold a demand from the cognizance of the arbitrators, on such submission, and then to sue for it." *Ib.* 313; *and see, also*, 23 *Barb.* 188; 19 *Wend.* 285; *Cow. & Hill's Notes to Phil. Ev.* 840, 1026, 1040, *and cases there cited.*

And where the submission is under seal, the withdrawal of a claim within it, by parol, at the hearing before the arbitrators, will not prevent the award operating as a bar to a subsequent action respecting such claim. 1 *Hill*, 44.

Confirming Award.] The proceedings to confirm the award, and for judgment thereon, are summary, and all the requirements of the statute must be complied with. 6 *Hill*, 303.

The statute provides that upon the submission being

proved by the affidavit of a subscribing witness thereto, and upon the award made in pursuance thereof being proved in like manner, or by the affidavit of the arbitrators, within one year after the making of the same, the court designated in such submission, shall, by rule, in open court, confirm such award, unless the same be vacated or modified, or a decision thereon be postponed as provided by the statute. 2 *R. S.* 542, *sec.* 9. For form of affidavits proving submission and award, see *Appendix*, Nos. 29 *to* 31.

In the affidavit of the witness proving the submission, or award, every fact should appear showing that he was a subscribing witness; and where the affidavit did not show that the witness subscribed when the bond of submission was executed, it was held defective. 6 *Hill*, 303. But where the objection was raised for the first time on error after confirmation, and judgment, it was held too late for the party to avail himself of it. Where error is brought upon such an objection, the party should take care to have it appear that the question was raised in the court below. *Ib.* 307, per Bronson, J. The proper course would be for the party to submit his objections in writing; and on bringing error, the objections would then be certified and returned with the other papers relating to the application. *Ib.*

The party sought to be charged by the proceedings should have notice of the motion to confirm. (5 *Wend.* 102; for form, see *Appendix*, No. 32); though this is not necessary if the right of such party to move to vacate or modify the award has expired, by reason of his omission to make such motion within the time authorized by the statute. 6 *Id.* 520; 2 *R. S.* 542, *sec.* 12, *post.* The notice should be served, personally, at least eight days before the first day of the term at which the motion is to be made, or it may be served by mail where the parties reside in different places between which there is a regular communication by mail, in which case, double that time is required. *See post.*

Where the bond of submission contained a stipulation that in case the award was not paid or fulfilled, judgment for the penalty of the bond might be forthwith entered up; it was

held that a special motion to the court was not necessary, but that the prevailing party was at liberty to perfect judgment in vacation, immediately after the award. 4 *Hill*, 551. In such case a rule for judgment may be entered, as of course, and without notice. *Ib.*

Where an order vacating an award is reversed, and the award is then sought to be confirmed, the proceedings are either remitted to the court below, to proceed thereon, or the court of review will proceed after due notice to the party complaining of the award, to confirm the same, in the same manner, and with the like effect as if application had been originally made to such court. 2 *R. S.* 544, *sec.* 21, *post; Lal. Supp. to Hill & Denio*, 110. And the court of review in such case may make an order to show cause at a special term why the award should not be confirmed. *Ib.*

Motion to Vacate the Award.] The statute authorizes any party complaining of the award to move the court designated in the submission, to vacate the same, upon either of the following grounds :

1. That such award was procured by corruption, fraud, or other undue means;

2. That there was evident partiality or corruption in the arbitrators or either of them ;

3. That the arbitrators were guilty of misconduct, in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear any evidence pertinent and material to the controversy, or any other misbehavior, by which the rights of any party shall have been prejudiced.

4. That the arbitrators exceeded their powers; or, that they so imperfectly executed them, that a mutual, final, and definite award on the subject-matter submitted, was not made. 2 *R. S.* 542, *sec.* 10; (*a*) 21 *Barb.* 382. For form of

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(*a*) The Revisers' original note to this section, is as follows: "The preceding section is chiefly an enumeration of the cases in which awards may be vacated, with some extension. (1) According to § 2, 1 *R. L.* 126; 2 *J. Ch. R.* 339; *Ib.* 551. (2) 3 *Caines R.* 166; 3 *Johns. R.* 367. (3) Founded in principle on 17

notice of motion, see *Appendix*, No. 33; and for order vacating award, see *Appendix*, No. 36.

To entitle a party to move to vacate an award under these provisions of the statute, the submission must have been a submission under the statute, and not at the common law. *See* 9 *Johns.* 213; 7 *Hill*, 331; 3 *Sand. S. C. R.* 4.

On the motion to vacate, the court will look beyond the submission and award; and affidavits will be received to show what took place at the hearing, and that the arbitrators exceeded their powers, or omitted to decide on all the matters submitted, &c. 4 *Denio*, 194; *and see*, 7 *Hill*, 329, *reversing* 1 *Id.* 489; *Id.* 319; 20 *Barb.* 412.

The Revised Statutes, it seems, have not changed the law as to the power of the court to set aside an award in respect to the conduct of the arbitrators. Formerly, an award might be set aside for partiality, or corruption, in the arbitrators; and this is still the law. 10 *Wend.* 589; 17 *Id.* 413. The assessment of damages may be so exorbitant as to induce the belief that the arbitrators acted corruptly, or with gross partiality; and in such case, their award will be set aside. 17 *Johns.* 406. And so the award will be set aside if the parties have not had an opportunity of being heard before the arbitrators; and it is not necessary in such case to show fraud or corruption. 3 *Barb. S. C. R.* 275. But corruption or partiality in arbitrators should be plainly established to justify the court to interfere on that ground. 4 *Selden*, 168, per Johnson, J.

The terms misconduct and misbehavior, as used in the statute, are not applicable to a mere error in judgment; but imply an intention to do wrong. 10 *Wend.* 590. And the court will not interfere where the arbitrators have erred only in respect to a question of law or fact. 14 *Johns.* 96; 1 *Barb. Ch. R.* 173; 3 *Paige*, 124; 10 *Wend.* 589; 17 *Id.* 410; 24

Johns. R. 405, (4) 14 *Johns. R.* 96. Concealment of material facts, by either party, is mentioned in some cases (17 *Johns. R.* 405), as a ground for vacating an award; but it is conceived that such a proposition would be too broad, and that the general expressions in the first subdivision are preferable." 3 *R. S.* 2*d ed.* 775.

Barb. 147. The court will not look into the merits of the controversy. *Id. ibid.*; 5 *Cowen*, 425. "It could never have been the intention of the legislature that the court should sit in review upon the decisions of all the arbitrators in the State; if such had been their intention, they would have provided some writ of review or writ of error. It was intended to give relief in cases of corruption or improper conduct on the part of the arbitrators or parties, or where there was a want of jurisdiction, or the award was not final, but in no other case." Per Savage, Ch. J., 10 *Wend.* 591; *and see* 17 *Id.* 413, *and* 3 *Paige*, 138, *supra.*

Motion to Modify or Correct the Award.] The statute further provides, that any party to the submission, may also move the court designated therein, to modify or correct the award in the following cases:

1. Where there is an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in such award;

2. Where the arbitrators shall have awarded upon some matter not submitted to them, not affecting the merits of the decision upon the matters submitted;

3. Where the award shall be imperfect in some matter of form, not affecting the merits of the controversy; and where, if it had been a verdict, such defect could have been amended or disregarded by the court, according to the provisions of law. 2 *R. S.* 542, *sec.* 11; 10 *Wend.* 589; 17 *Id.* 412; *Rev. Notes*, 3 *R. S.*, 2*d ed.* 775; *and see ante*, "Motion to vacate the award." For form of notice of motion, see *Appendix*, No. 34.

When, and how, Motions to be made.] The application to vacate or to modify the award must be made to the court designated in the submission, at the next term after the publication of the award, upon the same notice to the adverse party, as in other cases of special motions, if there be time for that purpose. If there be not time, such court, or any judge thereof, may, upon good cause shown, order a stay of

proceedings on such award, either absolutely, or upon such terms as shall appear just, until the term of the court next after such first term. 2 *R. S.* 542, *sec.* 12; 10 *Wend.* 589.

The application, under the above section, should regularly be made at a special term. *Sup. Court Rules*, 1858, *No.* 40; 10 *Wend.* 589. Notice of the motion should be served personally, at least eight days before the first day of the term at which the motion is to be made; or, it may be served by mail where the parties reside in different places, between which there is a regular communication by mail, in which case double that time is required. Service by mail is made by inclosing the notice in a wrapper and putting the same in the post-office, directed to the party, at his place of residence, and paying the postage on the letter. 1 *Burr. Pr.* 333, 352; *Code of Pro.* §§ 410, 411, 412. For form of Notice, see *Appendix*, Nos. 33, 34.

The application may be founded upon the submission and award; and, also, upon the affidavits of the parties, or the arbitrators, or others, setting forth the irregularities complained of. 4 *Denio*, 194. But the arbitrators will not be permitted to contradict their award. 3 *Paige*, 124; 12 *Wend.* 212. Nor to give evidence tending to impeach it. 1 *Barb. S. C. R.* 326; 20 *Id.* 482. Though their testimony may be received, when fraud is not alleged, to show that they did not take a particular subject-matter into consideration. 1 *Barb.*, *supra.* And that matters were included in the award which were not embraced in the submission. 20 *Id.* 410. But the rule that arbitrators are not permitted to give evidence to impeach or contradict their award, does not apply to arbitrators whose powers have been terminated by the appointment of an umpire, by whom the award is made. 1 *Barb. S. C. R.* 326.

Proceedings on the Application.] On the application to vacate or modify the award, the court may vacate the award in any of the cases specified (*supra*); and if the time within which such award shall have been required to be made, by the submission, has not expired, may, in their discretion, direct a rehearing by the arbitrators; and, in the

cases specified, the court may modify and correct such award, so as to effect the intent thereof, and to promote justice between the parties. 2 *R. S.* 543, *sec.* 13.

Judgment on the Award.] The statute provides that upon the award being confirmed or modified, the court shall render judgment in favor of the party to whom any sum of money or damages shall have been awarded, that he recover the same; and if the award shall have ordered any act to be done by either party, judgment shall be entered that such act be done according to such order. 2 *R. S.* 543, *sec.* 14. For form, see *Appendix*, No. 35.

This provision of the statute applies, of course, only to those cases where the submission is under the statute, and authorizes a judgment to be entered upon the award. 4 *Denio*, 347; 20 *Barb.* 486; 5 *Paige*, 578.

But there is a class of cases where judgment may be entered on the award of the arbitrators, although the submission was not under the statute. Thus, where there is an agreement to refer a pending suit to arbitrators, and that a judgment in the action shall be entered according to their decision, this will justify the entry of such judgment; and the judgment will be binding upon the parties as a judgment by consent. 11 *Paige*, 529; 12 *Wend.* 212; 16 *Barb.* 578. And so, where actions, not referable under the statute, are referred to referees, by stipulation or rule of court, and the stipulation or rule contains express authority that judgment may be entered on their report, judgment may be entered accordingly. 13 *Wend.* 293; 19 *Id.* 21; *Id.* 108. The principle upon which the authorities proceed, is stated by Bronson, J., in the case last cited, thus: "If the parties agree to an unauthorized reference, it amounts to nothing more than an arbitration; the suit is at an end—the court has no longer any jurisdiction over the parties, and will take no further cognizance of the matter. If there is an express agreement that judgment shall follow the report, that is regarded as equivalent to a confession, and judgment may be entered accordingly. But the right to enter judgment, where no action is pending, cannot

be taken by implication. There must be a warrant of attorney, or some other express authority for that purpose, or the judgment cannot stand." *Id.* 112.

The Costs and Expenses, &c.] The costs of the proceedings are required by the statute to be taxed as in suits; and if no provision for the fees and expenses of the arbitrators shall have been made in the award, the court shall make the same allowance as provided by law for references; but no costs shall be taxed for any other services or expenses prior to such application. 2 *R. S.* 543, *sec.* 14.

The costs of the proceedings are to be taxed at the rate allowed for similar services in civil actions. *Ib. and see Laws of* 1854, *p.* 592, *sec.* 3, *ante, p.* 16, *note;* 9 *How. Pr. R.* 304; *s. c.* 3 *Duer*, 616; 24 *Barb.* 149; 13 *How. Pr. R.* 400, per Harris, J. And, when taxed, the amount thereof should be inserted in the entry of judgment.

The arbitrators may award as to their own fees and expenses. 4 *Denio*, 249. If they have not done this, they will be allowed on the taxation, the same fees and expenses as referees. These are fixed by the statute at three dollars per day to each, for every day necessarily spent in the business. *Code of Pro.* § 313; 2 *R. S.* 643, *sec.* 36. If the fees of the arbitrators are not paid, they may prosecute for the same by suit at law; so held where a party revoked the submission, and one of the arbitrators brought an action against him for his fees and expenses, up to the time of revocation. 1 *Denio*, 188; *and see* 3 *Barb. S. C. R.* 63. And where such fees are awarded to be paid by one of the parties to the arbitrators, it seems that the other party to the award cannot recover them in an action on the award; at least without actual payment by him. 14 *Johns.* 368.

With respect to the costs and expenses of the arbitration, it has been held that the arbitrators have no power to award as to these, where the submission is under the statute, and contains no provision expressly authorizing it (4 *Denio*, 249); though this would be otherwise, according to the authorities in this State, where the submission is at the common law. 14

Johns. 161; 2 *Cowen*, 638; 22 *Wend.* 126. But see, per Beardsley, J., 4 *Denio*, 251, 2; and 13 *Barb.* 90, per Harris, J.

The statute further provides that if the court, on the application to vacate the award, shall vacate and set the same aside, costs shall be awarded to the prevailing party; and the payment thereof may be enforced by execution, as in other cases. 2 *R. S.* 544, *sec.* 19; *Laws of* 1847, *p.* 491.

Judgment Record.] A record of the judgment is required to be made, commencing with a memorandum reciting the submission; then stating the hearing before the arbitrators; their award; the proceedings of the court thereupon, in modifying or confirming such award; and the judgment of the court for the recovery of the debt or damages awarded, and that the parties perform the acts ordered by the award, and for the recovery of the costs allowed. 2 *R. S.* 543, *sec.* 15.

Such record shall be filed and docketed, as records of judgments in other cases; shall have the same force and effect in all respects; and be subject to all the provisions of law in relation to judgments in actions; and may in like manner be removed and reversed, on appeal. *Ib. sec.* 16; *Laws of* 1854, *p.* 592; *Code of Pro.* §§ 8, 11, 333; *and see* 9 *How. Pr. R.* 304, per Duer, J.; *s. c.* 3 *Duer*, 616; 24 *Barb.* 149.

On the subject of judgments in actions, to which reference is made for the practice in these proceedings, see the books treating of practice in actions; and for form of judgment record, see *Appendix*, No. 37.

How Judgment to be Enforced.] After the filing and docketing of the judgment, execution may issue thereupon against the property or person of any party against whom a recovery shall be had, in all respects as upon other judgments. 2 *R. S.* 543, *sec.* 16; *and see* 1 *Burr. Pr.* 293, *and Gra. Pr., title "Fieri Facias;" Voorhies' Code*, § 291, *and notes.*

And where, by such judgment, any party shall be required to perform any act, other than the payment of money, the

court rendering such judgment shall enforce the same by rule; and the party refusing or neglecting to perform and execute such act, or any part thereof, shall be subject to all the penalties of contemning an order of the court, and may be proceeded against as for a contempt, in the manner prescribed in the thirteenth title (2 *R. S.* 534) of chapter eight of part third of the Revised Statutes (*a*). 2 *R. S.* 543, *sec.* 18.

Appeals, and Proceedings therein.] The Revised Statutes provide that the judgment entered on the award, may be removed and reversed by writ of error, in the same manner as judgments in actions. 2 *R. S.* 543, *sec.* 16. The proceeding by writ of error, however, being abolished, the remedy of the aggrieved party is now by appeal under the Code of Procedure, the same as in actions. *Code of Pro.* §§ 8, 323, 333, *to* 348, 457, 471; *Laws of* 1854, *p.* 592 (*b*); 24 *Barb.* 149; 9 *How. Pr. R.* 304, 311, per Duer, J.; *s. c.* 3 *Duer*, 616; 2 *Sand. S. C. R.* 740; 6 *How. Pr. R.* 179; *Ib.* 319; 13 *Id.* 400, per Harris, J., *and see ante*, *p.* 16 *note.*

When an appeal is brought on such judgment, certified copies of the original affidavits upon which any application in relation to such award was founded, and of all other affidavits, and papers relating to such application, shall be annexed to, form a part of, and be returned with, the record of the judgment; and the appellate court shall reverse, modify, amend, or affirm such judgment, or any part thereof, according to justice. *Id. ibid.*; 2 *R. S.* 543, *sec.* 17.

Objections to the regularity of the proceedings, not affecting the merits, should be made in the court below, to entitle a party to avail himself of them on appeal. Thus, where the objection was raised for the first time on error, after confirmation and judgment, that the affidavit proving the submission did not show that the witness subscribed when the bond of submission was executed,—it was held too late for the party to avail himself of it. 6 *Hill*, 303. The proper course is for the party to submit his objections in writing to the court

(*a*) See *post*, Chapter X. (*b*) See the Act of 1854, *ante*, p. 19, note.

below, and on bringing error, the objections would then be certified and returned with the other papers relating to the application. *Ib.* 307, per Bronson, J.

An appeal will also lie upon an order vacating the award, the same as upon judgments in actions. And certified copies of such order, and of all affidavits and papers used on such application, are to be returned upon the appeal, the same as upon an appeal from an order confirming the award. 2 *R. S.* 544, *sec.* 20; *Code of Pro.* §§ 8, 323, 471, *and other authorities, supra.*

If such order be reversed, on appeal, the proceedings will be remitted to the court from which they were removed, to proceed thereon; or the appellate court may proceed thereon, after due notice to the party complaining of such award, to modify or confirm the same, in the same manner, and with the like effect, as if application for that purpose had been originally made to such court. 2 *R. S.* 544, *sec.* 21; *Lall. Supp. to Hill & Denio R.* 110. And the court of review, in such case, may make an order requiring the party to show cause at a special term, why the award should not be confirmed. *Ib.*

The appeal from the judgment of the county court, or from the mayors' or recorders' courts of cities, is to the general term of the Supreme Court. *Code of Pro.* §§ 344 *to* 347.

And from the decision at the special term of the Supreme Court, or the Court of Common Pleas, or the Superior Court of the city of New York, or the Superior Court of the city of Buffalo, the appeal is to the general term of the same court, or court in which the judgment is entered. *Ib.* § 348; *and see Laws of* 1854, *p.* 594, *ante p.* 19, *note; Laws of* 1857, *vol.* 1, *p.* 753; *Laws of* 1854, *p.* 228, *sec.* 26.

From the decision of the court at the general term, an appeal may be taken to the Court of Appeals. *Code of Pro.* § 11; *Laws of* 1857, *vol.* 1, *p.* 753, *sec.* 3; *and see* 1 *Kernan*, 52; *Id.* 276; 2 *Id.* 409.

The practice upon appeals is regulated by the Code of Procedure; and is substantially the same as on appeals from

judgments in civil actions.* *Code of Pro.* §§ 8, 11, 333 ; 9 *How. Pr. R.* 304, *supra ; Laws of* 1854, *ante p.* 19, *note ;* 24 *Barb.* 149.

The costs upon the appeal are the same also as upon appeals in actions, and are regulated by the Code of Procedure. *Id. ibid ; and see ante, p.* 16, *note.*

Revocation of Submission.] The agreement for the submission of matters in difference to arbitrators, is a mere authority, revocable by either party. At the common law, this might have been done at any time before the award was actually made and ready to be delivered to the parties. *Kyd on Awards*, 32, 3 ; 16 *Johns.* 205. But by the statute, neither party can revoke the submission, after the cause is finally submitted to the arbitrators, upon a hearing of the parties for decision. 2 *R. S.* 544, *sec.* 23 ; 20 *Barb.* 262 ; 11 *Paige*, 529. This statutory provision was not reported by the Revisers, but " was inserted by the legislature in the passage of this title through the two houses, for the purpose, undoubtedly, of guarding a person who had submitted his cause to arbitration, against the manifest injustice of having the submission revoked by his adversary, after the probable result of the arbitration had been ascertained, but before the necessary forms could be complied with to render the award binding upon the parties." 5 *Paige*, 579, per Walworth, Ch. And this provision of the statute applies to all cases of submission to arbitration, whether the submission authorizes a judgment on the award or not, 5 *Paige*, 575, *supra ;* 11 *Id.* 534 ; though it would be otherwise, if the submission is by parol. 4 *Denio*, 348, per Bronson, J. ; *and see* 15 *Wend.*, 99 ; 20 *Barb.* 486.

The revocation must be in writing, and under seal or not according to the submission. If the submission is under the statute, the revocation should be in writing ; if not under the statute, and it is by parol, the revocation may be by parol. *Cald. on Arb.* 31 ; *Kyd on Awards*, 32 ; 8 *Johns.* 125.

Where the submission is by one on the one side and two

on the other, one of the two cannot revoke without the assent of the other. 12 *Wend.*, 578.

Notice of the revocation should be given to the arbitrators. *Cald. on Arb.* 31; *and see* 16 *Johns.* 205. The death of a party is equivalent to a revocation; but in this case of implied revocation, no notice to the arbitrators is necessary. *Wat. on Arb.* 16.

No particular form of words need be used to constitute a valid revocation. If the intention to revoke can be gathered from the instrument of revocation, although it does not disclose in terms that the party revokes, it is sufficient. 1 *Cowen*, 335.

For form of revocation, see *Appendix*, No. 26; and for form of notice, see *Appendix*, No. 27. And see further on the subject of revocation, *Cowen & Hill's Notes to Phil. Ev.* 1032, 3, *and cases there cited.*

Liability for Revoking; Action; Damages, &c.] Whenever any submission to arbitration shall be revoked by a party thereto, before the publication of an award, the party so revoking shall be liable to an action by the adverse party, to recover all the costs, expenses and damages, which he may have incurred in preparing for such arbitration. 2 *R. S.* 544, *sec.* 23; 20 *Barb.* 267.

If the submission so revoked was contained in the condition of any bond, the obligee in such bond shall be entitled to prosecute the same, in the same manner as other bonds with conditions other than for the payment of money, and to assign such revocation as a breach thereof; and for such breach, he shall recover as damages the costs and expense incurred, and the damages sustained by him in preparing for such arbitration. 2 *R. S.* 544, *sec.* 24; 7 *Cowen*, 522.

No other sum, penalty, forfeiture or damages shall be recovered for any revocation of a submission to arbitration, than such as are prescribed in the last two sections; notwithstanding any stipulated damages, penalty, or forfeiture, contained in such submission, or in any other instrument, or

agreement collateral thereto. 2 *R. S.* 545, *sec.* 25; (*a*) 16 *Johns.* 209.

Construction of the Statute.] It is declared by the statute that nothing contained in the statutory provisions herein considered shall be construed to impair, diminish, or in any way affect the power and authority of the Court of Chancery over arbitrators, awards, or the parties thereto; nor to impair or affect any action upon any award, or upon any bond or other engagement to abide by an award. 2 *R. S.* 544, *sec.* 22.

It is intended by this section, "not to diminish the power of the court in peculiar and equitable cases; nor to affect actions on bonds or awards." *Rev. Notes*, 3 *R. S.* 775, 2*d ed.*

In what Cases a Court of Equity may Interfere.] A court of equity will interfere where there is gross and palpable mistake, 1 *Johns. Ch. R.* 101; *Ib.* 226; 2 *Id.* 276; or, where the award is obtained by the false and fraudulent statements of a party, 2 *Day*, 553; or, by the partiality and corruption of the arbitrators. 17 *Johns.* 406; *and see* 23 *Barb.* 188. But where there is no charge of corruption, or misconduct, or undue practice, in the arbitrators, an award will not be set aside, however unreasonable or unjust it may be. 2 *Johns. Ch. R.* 551. The award, however, must be within the jurisdiction of the arbitrators. If they have exceeded their powers, as, by including in the award matters not contained in the submission, the award will be void, and a court of equity may declare it so. 7 *Hill*, 329; *and see* 20 *Barb.* 410. Corruption or partiality in the arbitrators, should be plainly established to justify the court to interfere on that ground. 4 *Selden*, 168, per Johnson, J. And so, the court will not

(*a*) The Revisers' note to this section, and the two preceding sections, is as follows: "The three last sections are drawn in conformity to the decision of the Supreme Court in 16 *Johns. R.* 209; which it is deemed useful to declare, and to furnish the opportunity of settling finally the much agitated question respecting stipulated damages, which are frequently inserted in submissions, to avoid the general rule of law concerning penalties." 3 *R. S.* 2*d ed.*, 775.

interfere where there is a mistake of judgment in the arbitrators, 3 *Paige*, 124; nor where the objection is, that the arbitrators decided wrong either as to the law or the fact. 1 *Barb. Ch. R.* 173.

See also as to the authority of a court of equity to interfere in these cases, *Willard's Eq. Jur.*, 77, 164, 358; and see also, 1 *Paige*, 293; 1 *Johns. Ch. R.* 432; 5 *Wend.* 520.

Action to Enforce the Award.] The only remedy of the party for the enforcement of the award, where the submission is not under the provisions of the statute, is by action. The action is founded upon the award, or upon the bond or agreement of submission.

In actions involving the validity of an award, it was formerly the rule that a party could not impeach the award by going behind it, and showing that the arbitrators exceeded their authority, or omitted to pass upon all the matters included in the submission. 3 *Johns.* 367; 9 *Id.* 38; 1 *Hill*, 489. But the rule is now settled otherwise, and seems well established that in such cases the award may be impeached. 7 *Hill*, 329, *rev'g* 1 *Hill*, *supra*; 4 *Denio*, 199; 20 *Barb.* 411, per C. L. Allen, J. And oral evidence is admissible for that purpose, even though the submission and award are in writing and under seal. *Id. ibid.*

And so, the award may be impeached by showing that the losing party had no notice of the hearing before the arbitrators, 23 *Wend.* 628; 1 *Hill*, 490; or, by showing that before the award was made, the arbitrators resigned their authority, and that such resignation was accepted by the parties, 2 *Wend.* 602; or, that their authority was revoked, or any other fact showing that the arbitrators were acting without jurisdiction, or that the award is void. *See the cases cited supra, and* 9 *Barb.* 246.

But in an action on the award, the court will not inquire whether the arbitrators erred on the merits, or acted corruptly, 1 *Hill*, 319; 23 *Barb.* 188; nor whether they have committed errors or mistakes, in respect to the matters sub-

mitted to them, 20 *Barb.* 409, *and cases there cited;* 2 *Wend.* 567; nor whether the award is against law. 7 *Cowen*, 185; 14 *Johns.* 105.

No action can be sustained upon the bond of submission, where the arbitrators fail, without the fault of the parties, to make an award within the time limited by the submission for that purpose. 1 *Selden*, 427. Nor can an action be sustained upon such bond, where the award is not made within the time required by it, even though the parties, by an agreement under their hands and seals, have enlarged the time for making the award, and the award is made within such enlarged time. 9 *Johns.* 115; 5 *Paige*, 575. The remedy, in such case, is upon the submission implied in the new agreement, taken in connection with the bond, or by an action upon the award made in pursuance of such submission. *Id. ibid.*

Where the submission is by bond, and the party in whose favor the award is made, brings his action to enforce the payment of the award, he is not limited in the amount of the recovery to the penalty of the bond. 7 *Cowen*, 522. In such case, the amount the party is entitled to recover, is to be determined by the award. *Ib.* And the party can only recover the amount actually awarded, even though the agreement of submission contains a clause to the effect that the party who refuses to abide by the award should pay a larger sum than the amount awarded, as "ascertained and liquidated damages." 1 *Denio*, 464; *and see* 22 *Wend.* 163; 17 *Id.* 447; 5 *Cowen*, 150, *note.*

If money is directed to be paid by the award, no demand is necessary before suit brought. 22 *Wend.* 128. But where one party is directed to pay money on or before a certain day, and the other to do some other act on the same day, *e. g.*, to convey land—the acts, in such case, are concurrent, and neither can recover without performance or tender. 12 *Id.* 591.

Where the submission provided that judgment might be rendered in the county court upon the award made in pur-

suance of the submission; and after the arbitrators had made their award, the party in whose favor the award was made, without entering judgment upon such award, commenced an action upon the same; it was held regular, and that such party had his election either to enforce the award, under the statute, or to treat it as a common-law award, and enforce it by action. 24 *Barb.* 631.

CHAPTER III. (a)

FORECLOSURE OF MORTGAGES BY ADVERTISEMENT.

The proceeding to foreclose a mortgage by advertisement, although a special statutory proceeding, is not a "special proceeding" within the meaning of § 3 of the Code of Procedure. It is not a remedy in a court of justice; nor is it a proceeding *in personam;* but it is strictly and solely a proceeding *in rem*, or against the property, and is instituted only for the foreclosure of a lien.

The first legislative regulation, in this State, on the subject of sales under mortgages, or special powers, was by the Colonial act of the 19th March, 1774. 7 *Johns. Ch. R.* 50; 1 *Paige*, 69. In the first revision, after the Revolution, the same provisions were re-enacted. *Act of* 21*st Feb.*, 1788. They were again adopted in the revisions of 1801 and 1813. 1 *R. L.* 373. In the Revised Statutes of 1830, the previous statutory provisions were materially altered and improved, 2 *R. S.* 545; and the Revised Statutes have since been amended and altered from time to time, as experience has demonstrated the necessity for the same. *Laws of* 1838, *p.* 261; *Laws of* 1840, *p.* 290; *Laws of* 1842, *p.* 364; *Laws of* 1844, *p.* 529; *Laws of* 1857, *chap.* 308, *vol.* 1, *p.* 667. The

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(a) The design of this chapter is to treat only of the foreclosure of mortgages other than those to the people of this State. The provisions of the statute, therefore, relating exclusively to mortgages to the State, are omitted. See those provisions, 1 *R. S.* 211.

existing statutes on the subject will be found fully stated in the following pages; an examination of which, with the numerous decisions of our courts upon them, will show how important and extended is the practice and the litigation arising on the foreclosure of mortgages by advertisement.

In conducting the proceeding, the statute must be carefully followed; and an omission to comply with any of its material requirements, will render the proceedings irregular and void. *See* 9 *Barb.* 278; 11 *Id.* 191; 13 *Id.* 137; 20 *Id.* 18.

What Mortgages may be Foreclosed.] The statute provides that every mortgage of real estate, heretofore executed by any person being at the time more than twenty-five years of age, or hereafter executed by any person over the age of twenty-one years, containing therein a power to the mortgagee, or any other person, to sell the mortgaged premises, upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner therein specified. 2 *R. S.* 545, *sec.* 1.

The Revised Statutes took effect on the 1st January, 1830. If, therefore, the mortgage was executed prior to that time, the mortgagor must have been more than twenty-five years of age, at the time of the execution of the mortgage, to entitle it to be foreclosed under the statute. And if under that age, and the mortgage be foreclosed, the sale, it seems, would create no bar to the right of the mortgagor to redeem the premises. 5 *Johns. Ch. R.* 35. But the mortgage would be voidable only, not void; and no one but the mortgagor, or one claiming under him, could avail himself of the defect. 12 *Barb.* 9, *aff.* 5 *Selden*, 45.

A mortgage given to secure unliquidated damages, though it contain a power of sale, cannot be foreclosed under the statute. 3 *Barb. Ch. R.* 619. But where the mortgage is conditioned for the delivery of certain specific articles, and the mortgagee, on default, is authorized to sell the mortgaged premises, at public auction, and to retain from the proceeds

of the sale a specified sum, the mortgage may be foreclosed under the statute. 7 *Wend.* 458.

The power of sale is extinguished by payment; and if a foreclosure afterwards take place, even a bona-fide purchaser will acquire no title. 5 *Hill*, 272. And so, a tender to the mortgagee, or assignee, of the whole amount of the debt and interest, with the costs and charges, will render a subsequent sale on the mortgage irregular and void. 5 *Johns. Ch. R.* 35. Nor can a foreclosure take place, under the statute, on a mortgage which has once been foreclosed; as, where the mortgaged premises are sold on foreclosure, subject to installments thereafter to become due, and the mortgage is subsequently foreclosed for the unpaid installments. 7 *Paige*, 250.

But the mortgage is not extinguished where the assignee takes a quit-claim deed of one half of the mortgaged premises. At most, this can operate only as an extinguishment of one half or some other portion of the mortgaged debt, leaving the assignee at liberty to foreclose for the residue. 1 *Hill*, 107.

Who may Foreclose.] The foreclosure must be had in the name of the real party in interest, that is, the mortgagee; or, if the mortgage has been assigned, the assignee, or their legal representatives. 2 *R. S.* 546, *sec.* 4, *sub.* 1; 13 *Barb.* 137; 3 *Johns. Ch. R.* 129. And if the mortgage has been assigned, in part, the mortgagee and assignee, both, should be made parties to the proceedings. *See* 2 *Cow.* 231, 239. It is not necessary, however, that every person, having a mere equitable interest, should be made a party. *Id. Ibid.*

The authority to sell, and the exercise of it, is a matter of private contract between the parties, and not of jurisdiction; and, therefore, the administrators of a mortgagee appointed by the court of another State, where the mortgagee died, may come into this State, and foreclose a mortgage, pursuant to the power contained in it. 7 *Johns. Ch. R.* 45.

Requisites to Foreclosure.] To entitle any party to give

the notice prescribed by the statute, and to make such foreclosure, it is requisite,—

1. That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative;

2. That no suit or proceeding shall have been instituted at law, to recover the debt then remaining secured by such mortgage, or any part thereof; or if any suit or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered thereon has been returned unsatisfied in whole or in part; and

3. That such power of sale has been duly registered, or the mortgage containing the same has been duly recorded. 2 *R. S.* 545, *sec.* 2.

It was formerly held that an omission to record the power of sale would not affect the proceedings as between the mortgagor and mortgagee; and that the recording was for the protection of purchasers, only. 2 *Cowen*, 195; 4 *Id.* 266. But in the absence of any adjudication since the Revised Statutes, it would be safer in all cases, that the mortgage should be recorded. *See* 4 *Kent's Com.* 191, *note a*, *6th ed.*; *Rev. Notes*, 3 *R. S.* 776, *2d ed.*

Notice of Foreclosure, and what to contain.] Every such notice shall specify:—

1. The names of the mortgagor and of the mortgagee, and the assignee of the mortgage, if any;

2. The date of the mortgage and where recorded, or where the power of sale is registered;

3. The amount claimed to be due thereon, at the time of the first publication of such notice; and

4. A description of the mortgaged premises, conforming substantially with that contained in the mortgage. 2 *R. S.* 546, *sec.* 4. For form, see *Appendix*, No. 38.

The notice must also contain the time when, and the place where, the sale will be had. These may be fixed by the party foreclosing, without reference to the interests of other parties;

except, as we shall see (*post*), the sale must be in the day-time, and in the county where the mortgaged premises, or some part of them, are situated. 2 *R. S.* 546, *sec.* 6, *post;* 11 *How. Pr. R.* 175.

Where the day of sale was stated in the notice to be on *Sunday;* it was held competent for the mortgagee, after the advertisement of the notice, and before the day of sale, to postpone the sale to a subsequent day, without affecting the regularity of the proceedings. 12 *Wend.* 57; *see also* 7 *How. Pr. R.* 372.

The *place* of sale should be definitely stated in the notice; and where the notice stated that the sale would take place at the City Hall, New York, without stating the particular place,—all the buildings used for holding courts within the Park being, by law, deemed parts of the City Hall,—it was held that the notice would be too indefinite, were it not, that, by common usage, there is one established place for such sales, and that is the rotunda of the City Hall proper. 12 *How. Pr. R.* 490. If no place of sale is designated, the proceedings will be irregular. 5 *Johns. Ch. R.* 35.

The statute, it will be seen, requires the notice to specify the amount claimed to be due upon the mortgage at the time of the first publication of the notice; but it would seem that the true construction of that provision is, that the notice shall state the whole amount claimed to be unpaid thereon at the time of the first publication of the notice, and not merely the amount which has then actually become due and payable. 11 *Paige*, 626, per Walworth, Ch. The better practice would undoubtedly be, to state in the notice both the amount claimed to be due, and the amount claimed to be unpaid, at the time of the first publication of the notice. This would enable subsequent incumbrancers to determine the extent of the mortgage lien by the printed notice; and might, also, be beneficial to the mortgagee, in case he should be compelled to sell the whole premises, and thus satisfy the whole mortgage, when only a part of it was due. 7 *Paige*, 211; *Ib.* 248; 11 *Id.* 626; 16 *Barb.* 350.

Where the notice of sale makes a false assertion, as, that

the premises are to be sold for default of three mortgages, when there were only two, the third being on other land, by which the public might be misled, or purchasers deterred from bidding, the sale will be irregular and void. 5 *Johns. Ch. R.* 35. But a mere mistake in computing the amount due upon a mortgage at the time of the first publication of the notice, is not, of itself, sufficient to vitiate the sale. 11 *Paige*, 620; 1 *Hill*, 108; 16 *Barb.* 347.

Where the mortgagee designs giving a credit, on the sale of the premises, as to the whole, or any part, of the moneys which he is entitled to retain, he may, it seems, insert a notice in the advertisement of sale, of such determination, and of the security which he will require. *See* 7 *Paige*, 251, per Denio, V. C.

How Notice to be Given.] As no effect will be given to a foreclosure unless conducted as prescribed by the statute, it is material that great care should be taken, not only in preparing the notice of sale, but in the publication, and posting, and service of the same. An omission to comply with any one of those requirements, will render the proceedings irregular. 9 *Barb.* 278; 11 *Id.* 191; 13 *Id.* 137; 20 *Id.* 18.

The proceedings are to be conducted in conformity to the law in force at the time the foreclosure is commenced. 9 *Barb.* 482, *aff. in C. of A., Dec.* 1852.

The statute provides (2 *R. S.* 543, *sec.* 3) that the notice that the mortgage will be foreclosed by a sale of the mortgaged premises, or some part of them, shall be given as follows:

1. By publishing the same for twelve weeks, successively, at least once in each week, in a newspaper printed in the county where the premises intended to be sold shall be situated; or if such premises be situated in two or more counties, in a newspaper printed in either of them;

2 By affixing a copy of such notice, at least twelve weeks prior to the time therein specified for the sale, on the outward door of the building where the county courts are directed to be held, in the county where the premises are

situated; or, if there be two or more such buildings, then on the outward door of that which shall be nearest to the premises. And by delivering a copy of such notice at least twelve weeks prior to the time therein specified for the sale, to the clerk of the county in which the mortgaged premises are situated, who shall immediately affix the same in a book prepared and kept by him for that purpose; and who shall also enter in said book, at the bottom of such notice, the time of receiving and affixing the same, duly subscribed by said clerk, and shall index such notice to the name of the mortgagor. 2 *R. S.* 543, *sec.* 3, *as amended by Laws of* 1842, *p.* 364, *sec.* 5; *and by Laws of* 1857, *vol.* 1, *p.* 667.

3. By serving a copy of such notice at least fourteen days prior to the time therein specified for the sale, upon the mortgagor or his personal representatives, and upon the subsequent grantees and mortgagees of the premises whose conveyance and mortgage shall be upon record at the time of the first publication of the notice, and upon all persons having a lien by or under a judgment or decree upon the mortgaged premises, subsequent to such mortgage, personally, or by leaving the same at their dwelling-house in charge of some person of suitable age; or by serving a copy of such notice upon said persons, at least twenty-eight days prior to the time therein specified for the sale, by depositing the same in the post-office, properly folded and directed to the said persons at their respective places of residence. (*a*) *Laws of* 1844, *p.* 529; 2 *R. S.* 546.

(*a*) It is provided by statute, in cases where the notice of sale shall be published in the State paper by reason of all the printers and proprietors of newspapers in the county where the mortgaged premises are situated, refusing to publish the notice of sale for the price allowed by law, that a copy of said notice shall be served at least six weeks before the time of such sale, on the person in possession of the mortgaged premises, in all cases where the same are occupied; and where they are not occupied, and the mortgagor, his heirs or personal representatives, shall reside in the county where such premises lie, then upon such mortgagor, his heirs, or personal representatives, as the case may be. And proof of the service of such notice may be made, certified and recorded, in the same manner and with the like effect, as proof of the publication of a notice of sale under a mortgage. 2 *R. S.* 649, *secs.* 46 *and* 50.

In computing the *time* for the publication and posting and service of notices, under the above section, the first day is to be excluded and the last included; thus, personal service of notice on the 1st for the 15th of any month would be sufficient. 7 *How. Pr. R.* 372. And so, where the service is made by depositing the notice in the post-office, the service is good if the deposit is made on the 5th April for the 3d of May. 12 *Id.* 493. And so, of affixing the notice twelve weeks prior to the time specified for the sale, and of the publication of the notice, the first day is excluded and the last included. 16 *Barb.* 347.

Where the service of notice of sale is by mail, the twenty-eight days are to be counted from the time of the deposit of the letter in the post-office, and not from the postmark, or time of forwarding it. 12 *How. Pr. R.* 490, *supra.*

The first *publication* of the notice of sale must be at least eighty-four days, or twelve full weeks before the sale; and publication must be made in every intervening week, or until the expiration of the time required by statute. 16 *Barb.* 374, *supra.* It is usual, and would be safer, in all cases, in the absence of any adjudication on the subject, to give the notice thirteen insertions; thus making eighty-four days from the first publication to the last, exclusive of the day of the first publication. See per Hand, J., *Ib.* 351; 20 *Barb.* 150; 1 *Wend.* 90.

The foreclosure will be regular although the paper, in which the notice was published, was not well calculated to give that general information which, in such cases, should be afforded. 12 *How. Pr. R.* 444; 11 *Paige*, 624.

If there is no newspaper published in the county where the premises are situated, the notice may be published in a newspaper of an adjoining county. 2 *R. S.* 552, *sec.* 10. And so, if all the printers and proprietors of the newspapers in the county where the mortgaged premises are situated, refuse to publish the notice of sale for the price allowed by law, the mortgagee may publish the same in the State paper, instead of a paper printed in such county. *Ib.* 648, *sec.* 46.

The *affixing* of the notice on the outward door of the building where the county courts are directed to be held, is

all the statute requires. It is not necessary, therefore, that the party who affixed it, should afterwards see it there. 12 *How. Pr. R.* 490; 7 *Cowen*, 13. The notice of sale must also be affixed in the book prepared and kept by the county clerk for that purpose, twelve weeks prior to the time specified for the sale. And proof of the mere *delivery* to the clerk, for that purpose, would not be sufficient. *See Laws of* 1857, *post.* When the premises to be sold are situated in more than one county, notices should be affixed in each. *Rev. Notes*, 3 *R. S. 2d ed.* 776.

We have seen by the statute (*supra*), that the notice must be *served* upon the mortgagor or his personal representatives, and the subsequent grantees and mortgagees whose conveyance and mortgage are on record at the time of the first publication of the notice, and upon all persons having a lien under a subsequent judgment or decree. And if a subsequent mortgagee has assigned his mortgage, and the assignment is on record, notice should also be served upon the assignee. 10 *How. Pr. R.* 51. An omission to serve the notice upon any of those parties would render the sale irregular as to the party not served, and those claiming under him. 11 *Barb.* 193; 17 *Id.* 100; 10 *How. Pr. R.* 51, *supra.* And, it seems, if the omission is to serve upon the mortgagor, the sale will be void, 9 *Barb.* 284; 11 *Id.* 191; 16 *Id.* 9; and this, too, notwithstanding that the mortgagor is not the owner of the equity of redemption at the time of the foreclosure. *See* 20 *Barb.* 18.

If the mortgage was executed by husband and wife, and the wife survives her husband, she is entitled to notice of sale. 11 *Barb.* 191. She is a mortgagor within the meaning of the statute; and, therefore, the notice should be served upon her, even though the foreclosure should take place during the lifetime of her husband. *Ib.* 193; 6 *Paige*, 474; 8 *Barb.* 619.

In case of the death of the mortgagor, the notice, it seems, need not be served upon his heirs, but it is sufficient if served upon his personal representatives. The personal

representatives were substituted by the legislature for the heirs. (*a*) 11 *Barb.* 193, per Harris, J.

As to the *manner of service*, the mortgagee or party foreclosing, has three ways in which he may serve the notice of sale, service by any one of which will be sufficient. Thus, he may serve the notice personally, fourteen days prior to the time specified for the sale; or he may serve it fourteen days prior to the time of sale, by leaving it at the party's dwelling-house in charge of some person of suitable age; or, he may serve it by depositing it in the post-office twenty-eight days prior to the time of sale, properly folded and directed to the party at his place of residence. And the service may be made by mail, even though the notice is deposited in the post-office in the place where the party to be served resides, and though the party foreclosing resides in the same place. 1 *Kernan*, 196, *reversing* 16 *Barb.* 9. And where the service is by mail, it need not be deposited in any particular post-office, if it is mailed in this State, and there is no fraud or trick attempted. 16 *Barb.* 349, per Hand, J.

Where the service is made by mail the postage should be prepaid, if the post-office department requires prepayment on letters before forwarding them. The statute does not, in terms, require this; but the notice cannot be said to be properly folded and directed, within the reasonable construction of the statute, unless everything is done necessary to entitle the notice to be forwarded from the office where it is deposited.

(*a*) The statute, however, is not very clear upon this point. The 3d subdivision, above, requires the notice to be served upon the mortgagor or his *personal representatives*. No allusion is made to *heirs;* but, as we shall see, the sale of the premises, conducted as prescribed by the statute, is a bar of all claim or equity of redemption of the *mortgagor*, his *heirs* and *representatives*, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage, and also of any person having a lien by any judgment or decree upon the land or any part thereof contained in such mortgage subsequent to such mortgage, and of every person having any lien or claim by or under such subsequent judgment or decree, *who shall have been served with notice of said sale as required by law*. 2 R. S. 546, § 8, as amended by Laws

Postponement of Sale.] The sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale shall be postponed. 2 *R. S.* 546, *sec.* 5.

Publication in the newspaper is sufficient, without service of notice of the postponement. 7 *How. Pr. R.* 372.

Where the day appointed for the sale was Sunday, it was held competent for the mortgagee to postpone the sale to a

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of 1844, p. 530, sec. 4, *post.* This statutory provision would seem to make it doubtful, at least, whether the bar applies to any except those who have been served with notice of sale as required by the statute. *See* 9 *Barb.* 286. Besides, the terms "personal representatives," though ordinarily meaning executors or administrators, yet are sometimes construed to mean "the next of kin." *Burr. Law Dic.* 795, 886, *and cases there cited;* 2 *Will. on Ex.* 1027, *and note;* 3 *Brad.* 45.

Aside from the statute, service upon the heirs would seem to be necessary; and much more so, even, than upon the personal representatives. The personal representatives are interested to prevent a deficiency on the sale for which the estate might be liable. They are interested in the equity of redemption where the mortgaged premises consist of a term for years; and also where there is a probability of the personal estate of the mortgagor being insufficient to pay his debts. Those are the only cases in which the personal representatives are interested. And because they are thus interested, to require service of the notice upon them for the heirs, would afford no safety or possible advantage to the latter, for the reason that it would be only where there was a probability of the mortgaged premises proving worthless, or of no value to the heirs, that the personal representatives would have any interest whatever, in the sale. The interest of the heirs, however, is different. The title to the premises, except when it consists of a term for years, vests in them with all the rights and incidents of absolute ownership. The title vests, too, charged with the payment of the very mortgage which is being foreclosed, and which the heirs must pay out of their own property, without resorting to the estate of the mortgagor. 1 *R. S.* 749, *sec.* 4. And they are thus, in respect to the mortgaged premises, more nearly the "personal representatives" of the mortgagor than his executor or administrator is in respect to the same property.

In suits in equity for the foreclosure of mortgages, the heirs are indispensable parties. 2 *Barb. Ch. Pr.* 176; 10 *Paige*, 410. And as a foreclosure under the statute is "equivalent to a foreclosure and sale under the decree of a court of equity," so far as to be an entire bar to the rights of the heirs in the equity of redemption, there can be no substantial reason why the notice should be served upon them in the one case and not in the other.

subsequent day without affecting the regularity of the proceedings. *Ib.; see also* 12 *Wend.* 57.

If the postponement is made before the day appointed for the sale, it is sufficient that notice of such postponement be published in the newspaper in which the original advertisement is published. But if the postponement is not made until the day of sale, the mortgagee, or party foreclosing, should attend at the time and place of sale, and there state to the persons present the time and place to which the adjournment is made. In such case, the notice of postponement to be subsequently published and continued in the newspaper, must conform to the adjournment as previously announced. And where the notice, as published, stated a different and more distant day, on which day the sale was actually made, the proceedings were held to be void. 4 *Denio*, 107. And so, after publicly postponing the sale, the mortgagee is bound by it, and cannot so far disregard it as to proceed on the original notice. 7 *Johns.* 219.

The Sale.] The sale is required to be at public auction, in the day time, and in the county where the mortgaged premises, or some part of them, are situated. 2 *R. S.* 546, *sec.* 6.

The time and place designated in the notice of sale are to determine the time and place when and where the sale is to be had; as to which, see *ante*, "Notice and what to contain."

How the Premises to be Sold.] If the premises consist of distinct farms, tracts, or lots, they shall be sold separately; and no more farms, tracts, or lots shall be sold, than shall be necessary to satisfy the amount due on such mortgage, at the time of the first publication of notice of sale, with interest, and the costs and expenses allowed by law. 2 *R. S.* 546, *sec.* 6; 8 *Barb.* 9; 10 *Id.* 564.

When lands are mortgaged as one undivided tract or lot, and are subsequently subdivided by the mortgagor, for the purposes of sale or otherwise, the mortgagee, upon a foreclosure, is not bound to sell the lots separately, but may, it

seems, follow the description in the mortgage and sell them all together as one tract or lot. 8 *Barb.* 9, *supra.* And this is so, it seems, even though the mortgagor has sold some of the lots, so subdivided, to different persons. *Ib.* 12; *and see* 24 *Id.* 135. But it is doubtful whether the statute authorizes this construction; at any rate, to the extent there stated. On the contrary, there is room for saying that the statute speaks of the premises as they are situated at the time when the sale takes place. And where the premises since the mortgage was given, have been subdivided by the owner into two or more lots, and some of the lots so subdivided have been sold to different parties, there is no reason why the mortgagee should not be compelled to sell, first, the lots which are still owned by the mortgagor, and afterwards, if those lots will not pay the debt secured by the mortgage, then the remainder of the lots, separately, in the inverse order of their alienation; especially, if the owners of the premises require it, and the mortgagee's interest will not thereby be prejudiced. As to the rule which prevails, in such cases, in actions for the foreclosure of mortgages, see the following authorities: 6 *Paige*, 35; 8 *Id.* 277; 11 *Id.* 60, 71; 1 *Barb. Ch. R.* 353; 2 *Id.* 151; 2 *Comst.* 289; 4 *Sand. S. C. R.* 565, aff. 4 *Selden*, 271; 24 *Barb.* 135; 13 *How. Pr. R.* 485.

In all cases where the premises do not consist of distinct farms, tracts, or lots, the whole may be sold together; and the mortgagee, in such case, may apply the avails to the satisfaction of his mortgage, whether then due, or thereafter to become due. 7 *Paige*, 211; *Ib.* 248; 16 *Barb.* 350.

A sale of the premises, subject to the payment of installments thereafter to become due, is not authorized by the statute. It seems, however, where the notice of sale specifies the amount of such installments, and the sale is in fact made subject to them, an equitable lien would be created in favor of the mortgagee against the purchaser, for the future installments, which the purchaser would be deemed to have assumed. But the mortgage, as a mortgage, would be spent, and would no longer be a lien upon the premises for any part of the mortgage debt. 7 *Paige*, 250; 11 *Id.* 626.

Whether the mortgagee would have the right to allow the purchaser a credit upon a sale of the premises, for any part of the purchase money, has not been determined; although there is no doubt such credit could be given as to the whole, or any part of the money, which the mortgagee would be entitled to retain. *See* 7 *Paige*, 251, per Denio, V. C.

The Surplus Moneys.] The surplus moneys, after the mortgagee's claim has been fully satisfied, with the costs and expenses allowed by law, are to be paid to the mortgagor, or to his representatives. 7 *Paige*, 250; *Ib.* 168; 11 *Id.* 624.

If there are persons having subsequent incumbrances on the premises by mortgage, or otherwise, the mortgagee should retain the surplus, in trust for the parties interested, until their rights are ascertained and adjusted.

But where the mortgagee owns another mortgage, subsequent to the one foreclosed, or a judgment, and there is a surplus in his hands, he may apply such surplus to the payment of such subsequent mortgage or judgment. 11 *Barb.* 549; 13 *Wend.* 488. And so, where the mortgage foreclosed is payable in installments, he may apply the surplus, after satisfying the amount then due, with the costs, towards the payment of the installments thereafter to become due. 7 *Paige*, 248; *Ib.* 211. But if the premises are sold subject to installments thereafter to become due, the mortgagor, it seems, is entitled to the surplus moneys, after paying the amount due with the costs. *Id. ibid.*

The Mortgagee may Purchase.] The mortgagee, his assigns, and his or their legal representatives, may, fairly and in good faith, purchase the premises so advertised, or any part thereof, at such sale. 2 *R. S.* 546, *sec.* 7; 4 *Denio*, 41; 20 *Barb.* 559. See also *post*, "Evidence of Purchase."

Affidavits of Foreclosure.] In preparing the affidavits of the foreclosure proceedings, care must be taken to show that all the requirements of the statute have been complied with. 1 *Wend.* 90; 20 *Barb.* 559. For forms of affidavits, see *Appendix*, Nos. 39 to 43.

When the affidavits are filed and recorded, they are a substitute for a deed. But until that is done, or until a deed is given, in pursuance of the sale, no title passes to the purchaser. 4 *Denio*, 41; 13 *Barb.* 138; 20 *Id.* 559, *supra.* Though, it seems, if an affidavit is defective, an amended affidavit may be filed according to the truth of the case; and as to the mortgagor, at least, it may be filed at any time. 16 *Barb.* 352.

The statute provides that an affidavit of the fact of any sale pursuant to the notice of foreclosure, may be made by the person who officiated as auctioneer at such sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser, and shall be annexed to a printed copy of the notice of sale. 2 *R. S.* 546, *sec.* 9.

An affidavit of the publication of such notice of sale, and of any notice of postponement, may be made by the printer of the newspaper in which the same was inserted, or by his foreman or principal clerk; and an affidavit of the affixing of a copy of such notice on the outward door of the court house, may be made by the person who affixed the same, or by any other person who saw such notice so posted during the time required; and an affidavit of the affixing a copy of such notice in the books to be provided and kept by the clerk, may be made by the county clerk, or by any other person who saw such notice so affixed during the time required; and an affidavit of the serving of a copy of such notice on the persons entitled to service thereof, may be made by the persons who served the same. (*a*) 2 *R. S.* 547, *sec.* 10, *as*

(*a*) The statute further requires, where the notice of sale has been published in the State paper, on account of the printers and proprietors of the newspapers in the county where the mortgaged premises are situated having refused to publish the notice for the price allowed by law, that there must also be an affidavit of an application having been made to such printers or proprietors, stating that the price allowed by law for publishing the notice of sale, has been tendered to them and refused; which affidavit, together with proof of publication in the State paper, shall be deemed evidence of a compliance with the law requiring notice of sale to be published in the county where the mortgaged premises are situated. 2 *R. S.* 649, *sec.* 49.

amended by Laws of 1857, *vol.* 1, *p.* 667. For previous amendment, see *Laws of* 1844, *p.* 530.

Notwithstanding that the statute requires the affidavit of publication to be made by the printer of the newspaper, or his foreman or clerk, yet it is sufficient if made by the publisher. 16 *Barb.* 347.

A person who has seen the notice posted twelve weeks prior to the time of sale, has seen it during the time required within the meaning of the statute. It is not necessary that he should have seen it posted every minute, hour, or day, or even week, of the twelve weeks; though, it seems, it is safer and more prudent to see the posting weekly. 12 *How. Pr. R.* 491. If the affidavit shows that the notice was affixed, it is sufficient, without showing that the party who affixed it afterwards saw it there. *Ib.* And, it seems, it need not show that it was affixed on the door of the court house nearest the mortgaged premises. 10 *Barb.* 565.

See further as to what the affidavits should contain, *ante*, *p.* 64, "How notice to be given."

For forms of affidavits of circumstances of sale, publication of notice, affixing notices, service of notices and mortgagee's deed, see *Appendix*, *No.* 39 *to* 43.

Affidavits, before whom taken, and where filed.] The affidavits specified (*supra*) may be taken and certified by any judge of a court of record, any supreme-court commissioners, or any commissioner of deeds, and may be filed in the office of the clerk of the county where such sale took place. 2 *R. S.* 547, *sec.* 11.

But since the constitution of 1846, we have had no supreme-court commissioners, that office having been abolished by it. *Art.* 14, *sec.* 8.

The affidavit may also be taken before any justice of the peace. *Laws of* 1840, *p.* 187. But, it seems, it cannot be taken by a deputy county clerk in the absence of the clerk. 4 *Kernan*, 456.

Recording Affidavits, and their Effect.] Such affidavits

shall be recorded at length by such clerk, in a book kept for the record of mortgages; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained. 2 *R. S.* 547, *sec.* 12.

A note referring to the page and book where the evidence of any sale having been made under a mortgage, is recorded, shall be made by the clerk recording such evidence, in the margin of the record of such mortgage, if such record be in his office. *Ib. sec.* 13.

Evidence of Purchase.] When the mortgaged premises, or any part of them, shall have been purchased at such sale by the mortgagee, his legal representatives, or his or their assigns, or by any other person or persons whatsoever, as provided by the statute, the affidavits of the publication and affixing notice of sale, and of the circumstances of such sale, shall be evidence of the sale, and of the foreclosure of the equity of redemption, as herein specified, without any conveyance being executed, in the same manner, and with the like effect, as a conveyance executed by a mortgagee upon such sale, to a third person, has heretofore been. 2 *R. S.* 547, *sec.* 14, *as amended by Laws of* 1838, *p.* 261, *sec.* 8.

Although the above section does not specify the affidavit of the service of notices of sale, yet that affidavit is also necessary. All the affidavits showing a compliance with the provisions of the statute, are essential, in the absence of a deed, to perfect the purchaser's title. 20 *Barb.* 505. And the affidavits should show that the proceedings were conducted according to the law in force when the foreclosure was commenced. *See* 9 *Barb.* 482, *aff. in C. of A., Dec.* 1852.

Where the premises are purchased by the mortgagee, the foreclosure is not complete without the affidavits; as they stand in the place of a deed, and operate as a statute conveyance. And if a party, other than the mortgagee, purchases, and receives a conveyance from the mortgagee, and no affidavits are made, the publication of the notice and the other pro-

ceedings may be proved by common-law evidence. 4 *Denio*, 41; 20 *Barb.* 559; 10 *Paige*, 563. For form of mortgagor's deed, see *Appendix*, No. 47.

The mortgagee's deed is not sufficient to give the purchaser title to the premises, unless the sale is at public auction, and after notice as prescribed by the statute, 20 *Barb.* 564; and this, too, notwithstanding that the power of sale expressly authorizes the mortgagee on default to sell the premises at private sale to satisfy the debt. 3 *Kernan*, 200.

Effect of the Foreclosure.] Every sale pursuant to a power as aforesaid, and conducted as prescribed by the statute, made to a purchaser in good faith, shall be equivalent to a foreclosure and sale under the decree of a court of equity, so far only as to be an entire bar of all claim or equity of redemption of the mortgagor, his heirs, and representatives, and of all persons claiming under him or them by virtue of any title subsequent to such mortgage, and also of any person having a lien by any judgment or decree upon the land, or any part thereof, contained in such mortgage, subsequent to such mortgage, and of any person having any lien or claim by or under such subsequent judgment or decree, who shall have been served with notice of said sale as required by law. 2 *R. S.* 546, *sec.* 8, *as amended by Laws of* 1844, *p.* 530, *sec.* 4 (*a*).

The interest of a tenant under a demise from the mortgagor, made subsequent to the execution of the mortgage, is extinguished by the sale. 3 *Denio*, 214. And the mortgagee, in such a case, who has acquired the actual possession of the premises, is entitled to the crops sown by the lessee, and growing on the land at the time of the sale. 8 *Wend*, 584; *see also* 1 *Barb. Ch. R.* 613; 2 *Denio*, 176, *and note;* 6 *Barb.* 370. And so, where a mortgagor, subsequent to the execution of the mortgage, puts machinery and other fixtures upon the premises, they become a part of the real estate, and

(*a*) As to the previous amendments to this section, see *Laws of* 1840, *p.* 290, *sec.* 12; *Laws of* 1842, *p.* 365, *sec.* 6.

the purchaser at the sale acquires a title to them. 19 *Barb.* 317.

It is the policy, as well as the language of the statute, that these foreclosures and sales under a power, should, in cases free from fraud and gross irregularity, be held final and conclusive. 7 *Johns. Ch. R.* 50; 10 *Johns.* 195; 2 *Cow.* 195; 1 *Paige*, 70; 4 *Id.* 531.

But all the provisions of the statute must be complied with, to render the foreclosure effectual. And, therefore, an omission to serve the notice of sale upon any of the parties entitled to such service, would render the sale irregular as to the party not served, and those claiming under him, 11 *Barb.* 193; 17 *Id.* 100; 10 *How. Pr. R.* 51; and, it seems, if the omission is to serve upon the mortgagor, the sale would be void. 9 *Barb.* 284; 11 *Id.* 191; 16 *Id.* 9; 20 *Id.* 18.

The sale must also be made to a purchaser in good faith. A purchaser, without notice, is not affected by usury in the original debt for which the mortgage was given; although it would be otherwise with the mortgagee, or other party having notice. 10 *Johns.* 195; 14 *Id.* 435; 10 *Barb.* 558. Nor would a *bona-fide* purchaser, it seems, from a party who purchased at the foreclosure sale, with notice, be protected, in such case, where such party was not in the actual possession of the premises at the time of the second sale. *Ib.* And so, where the mortgage was paid and afterwards foreclosed, the purchaser at the sale, though purchasing in good faith, will acquire no title. 5 *Hill*, 272.

The Costs and the Taxation thereof.] The statute provides that in the taxation of the costs and expenses, the following allowances only shall be made:

1. For drawing and copies of the advertisement of foreclosure and sale, affidavits of the publication, posting and serving thereof, and of the circumstances of the sale and the deed thereof, the same allowance as is made by law to attorneys in the Supreme Court, for the drawing and copies of pleadings; and one dollar forserving each copy of the notice

of sale, required by law to be served. (2 *R. S.* 652, *sub.* 1, *as amended by Laws of* 1844, *p.* 530, *sec.* 3.)

2. A fee of ten dollars for superintending the sale thereon, and attending to the execution of the necessary papers.

3. The expense of publishing the advertisement, according to the rates allowed by law, for a period not exceeding twenty-four weeks; the expense of posting such advertisement and inspecting the same, not exceeding one dollar; the expense of recording the necessary affidavits, and of the proving or acknowledgment of the deed, and of its being recorded, and of necessary postage and searches. 2 *R. S.* 652, *sec.* 4.

By the act of 1857 (*chap.* 308, *vol.* 1, *p.* 667, *sec.* 1), the clerk of the county is entitled to a fee of twenty-five cents for affixing the notice of sale in the book kept by him for that purpose, and for making the entry and index thereof.

The party foreclosing is to be allowed for the draft and copies of the necessary papers, the same fees, and at the same rates of compensation, as attorneys were allowed for the draft and copies of pleadings under the fee bill of 1830. Those rates, so far as relate to these proceedings, have not been abolished by any of the subsequent changes in the fee bill. 6 *How. Pr. R.* 493. The allowance is, for the draft twenty-five cents, and for each copy twelve and a half cents. 2 *R. S.* 633, *sec.* 18.

The printer's fees for publishing the notice of sale in the newspaper are fifty cents per folio (one hundred words), for the first insertion, and twenty cents per folio for each subsequent insertion after the first. *Id.* 648, *sec.* 45.

Where the mortgagor obtained an injunction restraining the assignee of the mortgage from selling, but allowing the continuance of the notice, and the notice was published for twenty-six weeks, it was held proper to allow the expense of the publication for the whole period, notwithstanding that the statute limited the expense to a period not exceeding twenty-four weeks. 6 *How. Pr. R.* 493, *supra.*

The allowance of one dollar for serving each copy of the notice of sale, is in addition to the charge for making the copy of the notice to be served. But the allowance for copy of no-

tice, and service of same, is not proper, except where they are rendered necessary in order to effect a complete foreclosure. *Ib.* As to what parties are necessary to be served, see *ante*, "How notice to be given." And see the case in 6 *How. Pr. R. supra*, where the practice on the taxation and allowance of costs in these proceedings, is stated at large, by Harris, J. For a sketch of bill of costs, see *Appendix*, No. 44.

The statute provides, also, that the costs and expenses of foreclosing any mortgage by advertisement, shall be *taxed* by some officer authorized to tax costs in the Supreme Court, upon the requisition of any party liable to pay the same, and upon such party paying the expense thereof. 2 *R. S.* 652, *sec.* 3.

The party liable to pay costs, and who requires the costs to be taxed, is entitled to notice of such taxation. 6 *How. Pr. R.* 263. For form of Notice, see *Appendix*, No. 45. The requisition may be made by a person entitled to the surplus out of which the costs are to be paid. 6 *How. supra.*

The officers authorized to tax the costs in these cases are, justices of the Supreme Court, and county judges of the degree of counselors of the Supreme Court. 3 *How. Pr. R.* 32; *Ib.* 40; *Ib.* 172; *but see Ib.* 92. The clerk may also adjust costs, in certain cases, in the Supreme Court, *Code*, § 311; but it is doubtful whether he is a taxing officer in the Supreme Court within the meaning of the statute. *See Laws of* 1847, *p.* 645, *sec.* 38; 4 *How. Pr. R.* 305; 6 *Id.* 268; *Id.* 414.

The expense of the taxation is, the fees of the officer for that service. These are fixed by the statute at fifty cents. 2 *R. S.* 631, *sec.* 19. But as county judges and justices of the Supreme Court are not now allowed to charge fees, none can be charged by them for that service.

On the taxation of the costs it is the duty of the taxing officer to examine the bill presented to him, whether the taxation is opposed or not; and he is required to be satisfied that the items charged in such bill are correct and legal; and also to strike out all charges which, in his judgment, were not necessary to be performed, and for all folios in any of the affidavits and notices which were unnecessarily inserted.

2 *R. S.* 653, *sec.* 5; 6 *How. Pr. R.* 493. Charges for copies of papers should not be taxed without an affidavit that such copies were actually and necessarily used, or were necessarily obtained for use; nor should any disbursements be allowed without an affidavit specifying the items thereof particularly, nor unless they appear to have been necessary, and reasonable in amount. 2 *R. S.* 653, *sec.* 7.

For forms of Bill of costs, and Notice of Taxation, and Affidavit, see *Appendix*, Nos. 44 to 46.

CHAPTER IV.

FORCIBLE ENTRIES AND DETAINERS.

A FORCIBLE entry or detainer is committed by violently *taking* or *keeping* possession of lands and tenements, with menaces, force, and arms, and without the authority of law.

It seems, at the common law, a man disseized of lands or tenements, if he could not prevail by fair means might lawfully regain the possession thereof by *force*, unless he were put to the necessity of bringing his action, by having neglected to re-enter in due time. But this indulgence having been found by experience to be prejudicial to the public peace, by giving an opportunity to powerful men, under the pretense of feigned titles, forcibly to eject their weaker neighbors, and, also, by force, to retain their wrongful possessions, it was thought necessary by many severe laws to restrain all persons from the use of such violent methods of doing themselves justice. 1 *Haw.* 140; *Bac. Abr. Forcible Entry and Detainer; but see* 1 *Russ. on Crimes*, 303, 304, *and notes.* Hence, the statute 5 *Rich. II. st.* 1, *c.* 8, and other statutes, from time to time were passed in England, by which forcible entries and detainers were punished by imprisonment, and provision made giving the party aggrieved restitution of possession to the premises from which he had been forcibly ejected or detained. *Id. ibid.*; 3 *Jac. Law Dic.* 86. And previous to the passage of the present law on the subject in this State, those acts had been almost literally copied into our statute. *See* 1 *R. L.* 96.

They were found, however, not to answer the purpose for which they had been passed, owing mainly to the intricacy and obscurity of their provisions; and the present law on the subject, which went into effect on the 1st day of January, 1830, was intended to present as clearly and distinctly as possible, the substance and effect of the several acts above mentioned, as they had previously been understood in England and in this State. *Rev. Notes*, 3 *R. S.* 2*d ed.* 763.

What Constitutes a Forcible Entry or Detainer.] The statute provides that no entry shall be made into any lands or other possessions, but in cases where entry is given by law; and in such case only in a peaceable manner, not with strong hand, nor with a multitude of people. 2 *R. S.* 507, *sec.* 1; 1 *Russ. on Cr.*, 304 *to* 316.

To constitute a forcible entry there must be something of personal violence, or a tendency to or threat of personal violence, unless the entry or detainer be riotous. In all cases there must be something beyond a mere trespass upon the property. 17 *Wend.* 262; 24 *Barb.* 16. Breaking the door of a house, especially of a dwelling house, is the least evidence that has been held sufficient to constitute a forcible entry. Breaking the door of an outhouse, in the actual possession of the complainant, by forcing the lock, is not sufficient. *Id. ibid.*

The same circumstances of violence which will make an entry forcible, will make a detainer forcible, also; and whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter. 8 *Cowen*, 226; 3 *Bac. Abr.* 253.

Who may Institute the Proceedings.] The person forcibly put out, or forcibly held out of possession, and the guardian of any person being a minor, are the proper persons to institute the proceedings. 2 *R. S.* 507, § 2.

The proceedings must be prosecuted by and in the name

of the party whose legal right of possession has been invaded, and not by the individuals who may have been charged with authorities or duties respecting it; and, therefore, proceedings for the forcible entry and detainer of a church owned by a religious society, incorporated under the general statute, should be in the name of the corporation, and not in the individual names of the trustees. 1 *Kernan*, 94.

The person authorized to institute the proceeding must have an estate of freehold, or for a term of years in the premises then subsisting, or some other right to the possession thereof. 2 *R. S.* 508, *sec.* 3.

A mere intruder or trespasser cannot institute proceedings under the statute, and be restored to the possession which he unlawfully holds; but every person lawfully in possession, and forcibly excluded therefrom, is entitled to the benefit of the statute. The object of the legislature was to extend this remedy not only to those who were seized in fee, or who had a term for years, but to all who had *any right to the possession*. A tenant at will, therefore, is entitled to institute proceedings under the statute. 11 *Wend.* 157, 159. And proof of actual possession is sufficient to support the allegation in the inquisition that the complainant was possessed in fee simple. 9 *Id.* 50.

Officers authorized to entertain Proceedings.] The officers authorized to entertain a complaint under the statute, are the justices of the Supreme Court; also, the county judges, the mayor, recorder, or alderman of any city, in their respective counties and cities; and also the judges of the Court of Common Pleas, the City Judge, and any justice of the Marine Court, or of the District Court of the city of New York. 2 *R. S.* 507, *sec.* 2; *Ib.* 510, *sec.* 18; *Const. of* 1846, *art.* 14, *sec.* 8; *Laws of* 1848, *p.* 250, *sec.* 4; *Ib.* 404, *sec.* 1; *Laws of* 1852, *p.* 471; *Laws of* 1850, *p.* 388; 6 *Abb. Pr. R.* 146. Also the justices of the Superior Court of the city of Buffalo, within that city, *Laws of* 1857, *vol.* 1, *p.* 754, *sec.* 25; and the City Judge of Brooklyn, within the county of Kings. *Laws of* 1849, *p.* 174, *sec.* 26.

The Complaint.] Where any forcible entry shall be made, or where the entry shall be made in a peaceable manner and the possession shall be held by force, the person so forcibly put out, or so forcibly holden out of possession, and the guardian of any such person being a minor, may be restored to such possession by making a complaint, to any one of the officers authorized to entertain the proceedings, and by proceeding according to the provisions of the statute. 2 *R. S.* 508, *secs.* 2 *and* 3. For form of complaint and affidavit, see *Appendix*, No. 48.

The complaint must be in writing, and be accompanied by an affidavit of the forcible entry or forcible holding out, and that the complainant has an estate of freehold or for a term of years in the premises then subsisting, or some other right to the possession thereof, stating the same. 2 *R. S.* 508, *sec.* 3.

Where the complaint fully sets out the estate and right of possession of the complainant, and the forcible entry or the forcible holding out, and is verified by affidavit, no other affidavit is necessary. In such case, the complaint will be regarded both as a complaint and an affidavit. 7 *How. Pr. R.* 441. And where the affidavit, supporting the complaint, states a lawful possession, though it may not be technically sufficient, yet the objection will be waived, unless it is taken before the officer previous to the taking of the inquisition. 11 *Wend.* 157.

Precept for Jury.] The officer, upon receiving the complaint, is required to issue a precept to the sheriff or any constable of the county, commanding him to cause twenty-four inhabitants of the same county, duly qualified to serve as jurors, to come before such officer, at some time not less than two days thereafter, to inquire of such forcible entry, or such forcible holding. 2 *R. S.* 508, *sec.* 3. For form, see *Appendix*, No. 49.

Notice to the Defendant, and how Served.] The officer is immediately to cause a notice in writing, of the issuing of the precept, and of the time and place of the return thereof,

to be served upon the party against whom such complaint is made, by delivering the same to such person; or, if he cannot be found, by delivering such notice to some person of proper age on the premises; or, if there be no such person, by affixing the same on the front door of the house, if there be one; or, if there be none, on some other public and suitable place on the premises. 2 *R. S.* 508, *sec.* 4. For form of notice, and affidavit of service, see *Appendix*, Nos. 50, 51.

Proceedings before the Jury of Inquiry.] At the day and place appointed for the return of the precept, the officer is required to administer an oath to the persons returned summoned, who shall appear, not being less than thirteen, and not more than twenty-three, well and truly to inquire into the matters complained of, and a true inquisition thereof to make. For form, see *Appendix*, No. 52. And the jury so sworn are then to proceed to make inquiry into the forcible entry, or the forcible holding, complained of, and may examine witnesses on oath to be administered by such judge; and shall make and sign their inquisition before the said judge and deliver the same to him. *Ib. sec.* 5. For form of inquisition, see *Appendix*, No. 54.

If twenty-four persons be sworn on the jury of inquiry, the conviction will be void. 2 *Cai. R.* 98.

The defendant is entitled to produce witnesses before the jury, to cross-examine the plaintiff's witnesses, and to sum up the evidence. 11 *Wend.* 157.

Both parties have the same remedy to compel the attendance of witnesses, as parties in suits before justices' courts. 2 *R. S.* 510, *sec.* 17.

Proof of a sufficient estate or right of possession is to be made to the officer when the complaint is preferred, and before any process can be issued. The statute does not confer upon the jury the power to investigate the title or right of possession of either party. The appropriate subject of investigation before the jury of inquiry is the forcible entry or the forcible holding complained of; and the examination

is limited to that subject. 7 *How. Pr. R.* 169; *and see* 13 *Id.* 446.

Restitution Ordered, if there is no Traverse.] If the jury find that the defendant is guilty of the forcible entry or detainer, and the defendant does not traverse the inquisition in the manner specified by the statute, and within twenty-four hours after it is found, the officer shall award restitution of the premises, and assess the costs and expenses of the proceedings, and issue his precept to cause restitution, and for the collection of the costs, in the same manner as on judgment of verdict of guilty on the trial of such traverse. 2 *R. S.* 510, *sec.* 14. For form of award and of precept, see *Appendix*, Nos. 55 and 56.

The costs and expenses here allowed, are only the fees of the officers who are required to perform services in these proceedings. 6 *How. Pr. R.* 178; 5 *Id.* 22; 4 *Hill*, 541.

Traverse of Inquisition, &c.] If, by such inquisition, it shall be found that forcible entry was made, or that, the entry being peaceable, the possession was forcibly kept, the party complained against may traverse such inquisition, in writing, denying such forcible entry or forcible holding out, or alleging that he or his ancestors, or those whose estates he has, in such lands, have been in quiet possession thereof for the space of three whole years next before such inquisition found, and that his interest therein is not ended or determined. For form, see *Appendix*, No. 57. And if the defendant shall pay to such officer the fees of summoning a jury to try such traverse, and the jurors and officers' fees on such trial, such traverse shall stay all further proceedings on such complaint and inquisition until the same be tried. 2 *R. S.* 508, *sec.* 6.

If any person shall make affidavit before such officer, that the party complained against is the tenant of such person, under a valid and then subsisting demise, he shall be permitted, on payment of the fees specified in the last section, to traverse the inquisition as landlord, in the same manner as is

allowed to the party complained of, either with such party or without him. *Ib. sec.* 7.

The Traverse and Proceedings thereon.] Upon such traverse being made, either by the party complained against, or by his landlord, the officer shall issue a precept to the sheriff, or any constable of the county, commanding him to summon twelve qualified jurors to come before such officer, at the place therein to be specified, at a time not less than four nor more than eight days thereafter, to try such traverse. 2 *R. S.* 509, *sec.* 8. For form, see *Appendix*, No. 58.

The jurors shall be summoned, returned, and empaneled, in the same manner as provided by law in civil actions before justices of the peace (2 *R. S.* 243), and shall be sworn by the magistrate well and truly to hear, try, and determine, the said traverse. For form of oath, see *Appendix*, No. 60. They shall be kept together by such magistrate, and shall hear and examine any competent witnesses who may be offered, on oath, to be administered by him. *Ib. sec.* 9. For form of oath, see *Appendix*, No. 61.

After hearing the allegations and proofs of the parties, the jury shall be kept together until they agree on a verdict, by an officer, who shall be sworn as is usual on trials in courts of record. 2 *R. S.* 509, *sec.* 9.

If the jury cannot agree after being kept together for such time as the magistrate shall deem reasonable, he may discharge them, and issue a precept for a new jury; and the same proceedings shall be had in respect to such new jury. *Ib. sec.* 10.

If some of the jurors summoned are found to be disqualified, the officer may be directed to summon others in their places, until his panel contains twelve qualified jurors. 7 *How. Pr. R.* 441. The defendant is entitled to have his traverse tried by twelve jurors; and the trial by six only, without his consent, is erroneous. *Ib.*

What may be shown on the Trial.] On the trial of the traverse the complainant is only required to show, in addi-

tion to the forcible entry or detainer complained of, that he was peaceably in actual possession at the time of the forcible entry, or was in the constructive possession of the premises at the time of the forcible holding out. 2 *R. S.* 509, *sec.* 11.

And the defendant may show, in his defence, that he or his ancestor, or those whose interest in such premises he claims, have been in quiet possession thereof for the space of three whole years together, next before the inquisition found, and that his interest therein is not then ended or determined; and such showing will be a bar to the prosecution. *Ib.*

The questions, then, to be tried are the possession, and the forcible character of obtaining or holding it; not the question whether a party actually in peaceable possession and forcibly expelled, had the right to the possession. 7 *How. Pr. R.* 441.

The defendant may show, as a defence to the proceedings, that he was at the time of the alleged forcible entry and detainer, and had been for a long time previous, in the peaceable possession of the premises in question, and that they had never been in the actual possession of the complainant; and where the judge, before whom the proceedings were pending, rejected the evidence to show those facts, the inquisition was quashed. 13 *Id.* 446.

The proceedings do not embrace the investigation of titles to real property, or the right to its present enjoyment. 7 *Id.* 166; and see 9 *Wend.* 50; 11 *Id.* 157.

Judgment and Process thereon.] The verdict of the jury is to be received and recorded by the judge; and if the defendant is thereby found guilty, he is thereupon to award restitution of the premises so forcibly entered, or forcibly held, and to assess the costs and expenses of the proceedings. 2 *R. S.* 509, *sec.* 12. For form, see *Appendix, No.* 62.

And he is also thereupon to issue his precept, reciting the proceedings before him, and commanding the sheriff of the county, or any constable thereof, to cause the complainant to be restored and put into full possession of the premises,

according as he was seized or possessed thereof before such entry; and is, also, in the same precept, or in a separate execution, to direct the costs and expenses so assessed, to be levied and collected of the defendant, in the same manner as costs are or may be collected on judgments before justices of the peace in personal actions. *Ib. sec.* 13. For form, see *Appendix, No.* 63.

Duty of Sheriff and Constable.] Sheriffs and constables to whom any process issued by a judge, as authorized by the statute, shall be directed and delivered, shall execute the same, and if need be, shall command and take the power of the county forthat purpose. 2 *R. S.* 510, *sec.* 15; *Ib.* 551, *sec.* 3.

Jurors.] Twenty-four hours personal notice to any jury to attend upon any precept issued under the statute, shall be deemed sufficient service; and any person so summoned, who shall neglect to attend and serve as such juror, without reasonable excuse, to be allowed by the judge issuing such precept, shall be subject to the same fine, to be prosecuted for, collected and applied to the same use, as provided by law (2 *R. S.* 245, *sec.* 112) in respect to jurors in justices' courts. *Ib.* 510, *sec.* 16.

Witnesses.] The judge before whom the complaint shall be made, may, at the request of either party, issue his subpœna, requiring any person to appear and testify before him, or before the jury of inquiry, or before the petit jury, touching the matters directed to be heard before them. For form, see *Appendix, No.* 59.

And any person served with such subpœna, who, without reasonable cause, shall neglect to appear, or appearing, shall refuse to answer upon oath, touching the matters aforesaid, shall be subject to the proceedings and penalties prescribed by law, (2 *R. S.* 240, *sec.* 80, *&c.*) *Ib.* 510, *sec.* 17; 11 *Wend.* 159.

Proceedings set aside on Motion.] The proceedings may be quashed on motion founded on affidavits, for irregularity, and

a re-restitution awarded. 10 *Johns. R.* 304. 13 *Id.* 158; 1 *Cai. R.* 125. And it is not too late to make the motion after the inquisition has been traversed by the defendant. 13 *How. Pr. R.* 446.

And so, the proceedings may be quashed, if irregular or insufficient, when they are brought before the court on certiorari. 24 *Barb.* 16.

And the court may, also, in its discretion, permit the defendant to move to set aside the inquisition on the ground of the rejection of proper evidence before the jury, which found it, after having traversed it before the county judge; and delay will not necessarily preclude him from obtaining relief. 7 *How. Pr. R.* 166.

Certiorari to Remove Proceedings.] After inquisition found, the proceedings may be removed, by certiorari, into the Supreme Court. 4 *Wend.* 213; 7 *How. Pr. R.* 166; 13 *Id.* 446. For form of certiorari, see *Appendix, No.* 64.

But such proceedings cannot be removed unless the certiorari is allowed by a justice of the Supreme Court, or a supreme-court commissioner. 2 *R. S.* 510, *sec.* 19. But the constitution of 1846, having abolished the office of supreme-court commissioner (*art.* 14, *sec.* 8), the writ is now allowed by a justice of the Supreme Court. And also, it seems, by a judge of the Court of Appeals, county judge, or local officer elected to discharge the duties of county judge, and surrogate. *Laws of* 1847, *p.* 324, *sec.* 17; 10 *How. Pr. R.* 181.

The writ will not be allowed by such officer, unless the defendant prosecuting the same, with two sufficient sureties to be approved by such officer, or, in case of the absence of such defendant, three sufficient sureties, to be approved, as aforesaid, become bound to the complainant in such penal sum as such officer shall direct, not less than one hundred dollars, conditioned that such party will appear at the return of the said certiorari, and answer to the inquisition found, and abide such order and judgment as the Supreme Court shall make in the premises, and pay all costs that shall be awarded against such defendant. 2 *R. S.* 510, *sec.* 20.

The bond, when duly executed, is to be delivered to the judge to whom the certiorari is directed; and until the same is so delivered, such certiorari will be of no effect. *Ib.* For form of bond, see *Appendix*, No. 65.

The judge is required to annex and file the bond with his return to the writ; and the Supreme Court is to proceed therein, and cause the defendant to traverse the inquisition, if no traverse has been had, and to direct a trial. *Ib. sec.* 21. For form of return and traverse, see *Appendix*, Nos. 66, 67.

If the defendant omit to traverse the inquisition within such time as the court, by rule, shall direct, restitution shall be awarded by the court, with costs. And if, upon the trial of the traverse, the defendant be found guilty, the court shall also award restitution, with costs; and, in either case, the court may authorize the complainant to prosecute the bond given, on the allowance of the writ of certiorari. *Ib. sec.* 22.

Where the proceedings are removed by certiorari, into the Supreme Court, and the issue therein is ordered to be tried at the circuit, if the complainant do not proceed to trial, judgment as in case of nonsuit will be granted, the same as in actions. 3 *Hill*, 446.

The prevailing party, upon the certiorari, will be entitled to costs, which will be assessed substantially at the same rate allowed for similar services in civil actions. See *post*, "Costs."

Appeal to the Court of Appeals.] From the decision of the Supreme Court, upon the certiorari, either party may appeal to the Court of Appeals. *Code of Pro.* § 11; and see 1 *Kernan*, 52; *Id.* 94; *Id.* 276.

The proceedings and costs upon the appeal are regulated by the Code of Procedure; and are the same, substantially, as on appeals from judgments in civil actions. *Code of Pro.* §§ 8, 11, 333; 9 *How. Pr. R.* 304, per Duer, J.; *s. c.* 3 *Duer*, 616; and see *ante*, *p.* 16, *note.*

Costs.] We have seen that the complainant, if successful

before the magistrate, is entitled to his costs and expenses of the proceedings. They are the fees only of the officers who are required to perform services in these proceedings. 6 *How. Pr. R.* 178; 5 *Id.* 22; 4 *Hill*, 541. The costs and expenses are to be assessed by the magistrate; and it is not necessary that they should be taxed. Attorney and counsel fees are not recoverable. *Id. ibid.*

Where the proceedings, after inquisition, are removed by certiorari into the Supreme Court, the party prevailing is entitled to costs. 2 *R. S.* 613, *secs.* 3, 16, 39; and see 3 *Hill*, 446, per Bronson, J.; 6 *How. Pr. R.* 178.

The costs, in such case, will be regulated by the Code of Procedure. *Laws of* 1854, *ante*, *p.* 16, *note;* and see *Code of Pro.* §§ 307, 318, 471; 7 *How. Pr. R.* 154; 14 *Id.* 527; 6 *Id.* 179; *Id.* 319; 2 *Sand. S. C. R.* 740; 9 *How. Pr. R.* 304; *s. c.* 3 *Duer*, 616.

In appeals to the Court of Appeals, the costs are also regulated by the Code of Procedure; and are the same as on appeals from judgments in civil actions. *Code*, §§ 8, 11, 333; 9 *How. Pr. R.* 304, *supra;* 2 *Sand. S. C. R.* 740; and see *ante*, *p.* 16, *note.*

The Remedy at the Common Law.] An indictment lies at the common law for a forcible entry or detainer, inasmuch as it tends to disturb the public peace. 1 *Russ. on Cr.* 304 to 316; 8 *Cowen*, 226.

And upon the conviction of a defendant upon any indictment for forcible entry or forcible detainer, found in any court of sessions, or in any court of oyer and terminer, such court may award restitution in the same manner as a judge upon a verdict rendered before him, as provided by the statute. 2 *R. S.* 511, *sec.* 23.

Action of Trespass for the Forcible Entry or Detainer.] The statute provides, that if any person be disseized, ejected, or put out of any lands or tenements, in a forcible manner, or, being put out, be afterwards holden and kept out by force, or with strong hand, he shall be entitled to maintain an action

of trespass, and shall recover therein treble the damages assessed by the jury, or by a justice of the peace, in cases provided by law. 2 *R. S.* 338, *sec.* 4.

An action cannot be sustained under the above section, unless there be something beyond a mere trespass; the entry or detainer must be riotous; or personal violence must be used; or there must be threats or menaces of violence; or other circumstances must exist inducing alarm or terror in the occupant of the premises. But it is not necessary, in such action, to show a conviction under the statute of forcible entry and detainer; the evidence, however, in each proceeding, must be the same in respect to the degree of force, to distinguish the transaction from an ordinary trespass. 17 *Wend.* 257.

And so, trespass lies against a person who has been put in the possession of land by a writ of restitution, under a conviction for a forcible entry and detainer, and afterward turned out, on the proceedings being quashed, and re-restitution awarded. But, in such case, it will not lie against a stranger, who has acted under a license from the person in possession; for a stranger cannot be made a trespasser by relation. 3 *Cai. R.* 261.

Rights Saved by the Statute.] It is provided by the statute, that nothing therein contained shall be construed to impair the rights of any landlord or lessor, or of any tenant, in any case not therein provided for. 2 *R. S.* 516, *sec.* 50.

CHAPTER V.

HABEAS CORPUS AND CERTIORARI. (a)

Section I. Writ of habeas corpus and certiorari to inquire into the cause of detention, and in other cases.

II. Writ of habeas corpus to bring up a person to testify.

SECTION I.

WRIT OF HABEAS CORPUS AND CERTIORARI TO INQUIRE INTO THE CAUSE OF DETENTION, AND IN OTHER CASES.

The oppression practiced by Charles II. and his council towards an obscure individual by the name of Jenks, gave birth to the famous *Habeas Corpus* act of 31 *Car. II.*, *c.* 2, which was termed by Blackstone, the second Magna Charta of the kingdom. 3 *Bl. Com.* 135, 6. The provisions of that celebrated act have been substantially embodied in the several statutes which have been passed in this State on the subject; and they now constitute the substratum and model of

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(a) The statutory provisions relating to the writ of habeas corpus, so far as the same are applicable to persons "legally held to labor or service in any State or territory of the United States," are omitted in the following pages. See those statutes, 2 *R. S.* 560, *secs.* 6 *to* 19; *Laws of* 1834, *p.* 87; *Laws of* 1840, *p.* 174. Those provisions are not of frequent application, for which reason, it is not deemed important to insert them. Besides, so far as they authorize courts or officers to take cognizance of claims made by the owners of fugitive slaves, coming from other States, and prescribe a certain course of proceeding thereon, they are void, being in conflict with the laws of the United States. 3 *Hill*, 651,

our Revised Statutes. (*a*) 2 *R. S.* 563; *and see* 1 *R. L.* 354; *Laws of* 1818, *ch.* 277, *p.* 298; 3 *Hill*, 648, *note;* 1 *Duer*, 713; *Hurd on Hab. Corpus*, 287.

The following is the Revisers' preliminary note to the article of the Revised Statutes relating to this writ:

"We have two statutes relating to the celebrated writ of *habeas corpus ad subjiciendum*, the revised act of 1813, and the amendatory act of 1818 (*supra*). These statutes, so far as they define the cases in which the writ is to be issued, relate only to the powers and duties of judges in *vacation;* leaving that branch of the subject which relates to the powers and duties of the superior courts during *term time*, to depend upon the common law.

"As this writ is justly esteemed a great bulwark of personal liberty, it is conceived that the law in relation to it should be brought into one general institution, and be made accessible to all. With this view it has been deemed expedient, in revising the two statutes above cited, to enlarge the provisions so as to embrace not only cases in vacation, but in term time. Various alterations have also been made, for the purpose of carrying out more fully the principles of the statutes, and remedying those defects which have been discovered in the course of our judicial experience, in the common law as well as in the statutes. Among other new provisions introduced in this article, the following are the most important:

"1. The cases in which the writ may be issued, are expli-

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note; 12 *Wend.* 311; *s. c. on error*, 14 *Id.* 507; 16 *Peters*, 608; 1 *Rand.* 15, 22, 23; *and see Hurd on Habeas Corpus*, 634.

(*a*) For the origin and history of the writ of habeas corpus, see 3 *Black. Com.* 129; *Bac. Abr. Habeas Corpus* (B.) *pl.* 13; 2 *Kent's Com.* 25; 3 *Steph. Com.* 695, &c. And see the elaborate note in 3 *Hill's Reports*, 647 *to* 676, by NICHOLAS HILL, ESQ., where the practice upon habeas corpus is considered at length, in connection with the Revised Statutes on the same subject, and with full reference to the authorities. And see also the work, recently published, entitled, "A Treatise on the Right of Personal Liberty, and the Writ of Habeas Corpus," &c., by ROLLIN C. HURD, ESQ., where the principles of law and the rules of practice governing the writ of habeas corpus, generally, are fully treated and considered.

citly defined; the mode of proceeding prescribed; and many guards provided, to prevent its being eluded or disobeyed.

"2. The penalties prescribed for a refusal of the writ, have been extended to members of the courts, as well as to judges in vacation.

"3. Provision has been distinctly made for controverting the return.

"4. The course of proceeding, where the party is detained under civil process, is explicitly declared so as to remove the doubts which now exist, as to the propriety of resorting to the habeas corpus for relief in such cases.

"5. The writ of certiorari has been introduced, to save the needless expense and needless hazard which are often incurred under the present law.

"6. The cases in which a party who has been once discharged, may be again imprisoned for the *same cause*, have been defined.

"7. Sheriffs and other officers are protected from any civil action for discharging a party pursuant to any order made upon habeas corpus or certiorari." *Rev. Notes*, 3 *R. S.* 784, 2*d ed.*

In what Cases the writ Issues.] The writ of habeas corpus issues to inquire into the grounds upon which any person is restrained of his liberty, and when it is found that the restraint is illegal, to deliver him from such restraint. This end is ordinarily attained by allowing the party improperly restrained, the free exercise of his volition. Where, however, the writ is issued for the purpose of determining the custody or disposition of an infant child, and such child is too young to be capable of determining for itself, the court or officer determines for it. *See* 3 *Hill*, 647, *note; Hurd on Hab. Corp.* 209.

The writ also issues to bring a prisoner into court for the purpose of examining him as a witness in any action or proceeding. This form of the writ will be hereafter considered.

It frequently issues, also, for purposes connected with the administration of justice; as, where an indictment is pending

against an individual imprisoned on conviction of a crime in any county jail or state prison, for an offense committed during such imprisonment, for the purpose of bringing the individual, so indicted, before the court, for arraignment or trial. *Laws of* 1847, *p.* 628, *sec.* 157. And so the court, in which any indictment is pending for a felony against any person imprisoned on conviction of a crime, in any county jail or state prison, may issue a habeas corpus for the purpose of bringing the person so indicted before such court for arraignment or trial on such indictment. *Ib. sec.* 158. The writ issues, also, in behalf of a prisoner found guilty of a criminal offense, for the purpose of obtaining his discharge on bail, after he has removed the proceedings by writ of error to an appellate court. 2 *R. S.* 740, *sec.* 19. And so, also, to bring up the body of a person on whose life a prior estate depends, when such person is in prison, or is otherwise detained. *Ib.* 344, *sec.* 7. And the general statutory provisions relating to the writ of habeas corpus, here considered, are to apply to these cases, so far as those provisions are applicable, except where otherwise provided. *Ib.* 575, *sec.* 86.

The writ in like manner issues at the common law, to bring a prisoner before the court, on the application of his bail in a civil action, for the purpose of exonerating the bail from liability. 7 *Wend.* 132.

And so, when property is stolen in one county, and the prisoner is committed for the offense to the jail of another county, if he is indicted in the county where the property was stolen, the district attorney of that county may apply to the court for a habeas corpus to bring up the prisoner, so that he may be delivered to the sheriff of that county for trial. 9 *Wend.* 505; 2 *R. S.* 574, *sec.* 77.

And so, the writ issues to obtain the discharge of a minor who has enlisted into the army of the United States, without the consent of his parent or guardian. 7 *Cowen*, 471; *and see, post, p.* 126.

But the writ of habeas corpus does not lie to review the judgment or decision of a court or officer having competent jurisdiction, 5 *Hill*, 164; 22 *Barb.* 178; nor to try the right

to the guardianship of an infant, 8 *Paige*, 47; nor to correct formal defects in the process on which the prisoner is detained, 3 *Barb. S. C. R.* 37; 1 *Id.* 340; 1 *Hill*, 154; 3 *Id.* 661, 663, *note;* nor to determine whether the affidavits upon which an attachment for a contempt is issued, are sufficient, 2 *Sand. S. C. R.* 724; *s. c.* 4 *How. Pr. R.* 369; nor to compel a wife to return to the bed and board of her husband, and to the performance of her conjugal duties, where she voluntarily absents herself from her husband. 8 *Paige*, 47. Nor will it be converted into a *quo warranto*, for the purpose of determining a question of usurpation of office. 3 *Barb. S. C. R.* 163.

And the writ of habeas corpus to inquire into the cause of detention, in all cases, whether under the statute, or at the common law, except when issued by the Supreme Court, or one of the justices thereof, can only be allowed for the purpose of delivering the person for whose relief it is asked, from illegal imprisonment or restraint. If on the return to the writ, the alleged illegal imprisonment is disproved, the jurisdiction of the officer ceases and the proceedings will be dismissed. If the illegal imprisonment is admitted or proved, the only order that will be made will be that the person imprisoned be discharged. And the only exception to this, it seems, is in the case of an infant of such tender years as to be incapable of making a choice for itself. *See* 1 *Duer*, 709, 715, 720, 725; 22 *Barb.* 179, 188, *aff.* 4 *Kernan*, 575; and see *post*, "Custody and Disposition of Infants."

Who may have the Writ.] Every person committed, detained, confined, or restrained of his liberty, within this State, for any criminal or supposed criminal matter, or under any pretense whatsoever, except in the cases specified under the next head, may prosecute a writ of habeas corpus, (*a*) or

(*a*) The writ of habeas corpus is a prerogative writ, not *ministerially* issuable, *i. e.*, not issuable of course; and yet it is a writ of right on a proper foundation being made out by proof. 3 *Hill*, 649, *note*, pl. 2; and see 16 *Barb.* 362.

of certiorari, (*a*) according to the provisions of the statute, to inquire into the cause of such imprisonment or restraint. 2 *R. S.* 563, *sec.* 21.

Imprisonment, within the sense of the law on this subject, may be either by some private person acting without process, and under pretense of private right; or by one claiming to act under due process of law. 3 *Hill*, 650, *note; and see Hurd on Hab. Corpus*, 209.

Where the contest is between a father, and a master to whom children have been indented, the latter may have the writ to bring up the children, when in their father's custody. 1 *Sand. S. C. R.* 672. "In these cases," says Sandford, J., in the case cited, "the court acts for and in behalf of the children, to see that they are under no improper restraint. The master may set its powers in motion, and the court will interfere so far as to permit the children to go where they please when they are old enough to understand their own wishes, and those wishes lead to no improper custody." *Ib. p.* 679; *and see* 8 *Johns.* 328; *Hurd on Hab. Corpus*, 545 *to* 548.

The writ will issue, also, at the instance of a parent or a guardian, for the custody and disposition and deliverance of a child, or a ward. 8 *Paige*, 47; 25 *Wend.* 64; 3 *Hill*, 399; 22 *Barb.* 178; 4 *Kernan*, 575; *Hurd on Hab. Corpus*, 213, 454, 548. And so, by a husband for the deliverance of a

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(*a*) The remedy by *certiorari*, is not usually resorted to, though it is nearly concurrent with that by habeas corpus. Where the personal attendance of the prisoner is not required, or not necessary to the determination of the question whether there is a legal cause of confinement or restraint, this writ can properly be employed, and is as effectual, in such case, as the writ of habeas corpus. *Rev. Notes*, 3 *R. S.* 784, 2*d ed.*; 3 *Hill*, 676, *note; and see* 3 *Park. Cr. R.* 531, *rev'g. Id.* 520. And the writ of certiorari is the only proper writ where it appears that the offense for which the person is confined or detained is not bailable, according to the provisions of law. 2 *R. S.*, 569, *sec.* 50.

The writ of certiorari is also occasionally used, it seems, to obtain a more definite and full return of the cause of the imprisonment or detention of a party. 3 *Park. Cr. R.* 600, 605. In the case cited, it was issued for that purpose, simultaneously with the writ of habeas corpus, and was directed to other parties than those having the custody of the prisoner.

wife. *Ib.* 451; 1 *Duer*, 714, 715. In such cases the writ issues at the common law, and not under the statute, except in the cases provided for by the statutory provisions stated immediately hereafter (2 *R. S.* 149, *secs.* 1, 4); and except also, in the case of an infant, too young to be capable of judging for itself. In the last-mentioned case, the officer, under the statute, is authorized to determine for the infant, and if such infant is restrained, to remove such restraint, by delivering it to its legal custodian. 1 *Duer*, 725; (*a*) 22 *Barb.* 179; 4 *Kernan*, 575; 8 *How. Pr. R.* 288.

In respect to the statutory provisions alluded to, it is provided, that where a husband and wife live in a state of separation, without being divorced, and have a minor child of the marriage, the wife, if she is an inhabitant of this State, may apply to the Supreme Court for a habeas corpus to have such child brought before it. 2 *R. S.* 148, *sec.* 1; 18 *Wend.* 637; 19 *Id.* 16; 2 *How. Pr. R.* 61. And where the husband or wife has attached himself or herself to the society of Shakers, and detains a child of the marriage between them, the husband or wife, on application to a justice of the Supreme Court, may have the writ to bring such child before the officer issuing it. 2 *R. S.* 149, *sec.* 4, *post.*

See further in respect to the persons who may have the writ, *ante*, *p.* 97, "In what cases the writ issues."

Who is not entitled to the Writ.] The statute provides that the following persons shall not be entitled to prosecute the writ:

1. Persons committed or detained by virtue of any process issued by any court of the United States, or any judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or shall have acquired exclusive jurisdiction by the commencement of suits in such courts.

(*a*) See this case, in which the distinctions between the common-law and the statutory habeas corpus, are stated and explained by Duer, J. And see the same case in the Supreme Court, before Barculo, J., 8 *How. Pr. R.* 288.

2. Persons committed or detained by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree.

But no order of commitment for any alleged contempt, or upon proceedings as for contempt, to enforce the rights or remedies of any party, shall be deemed a judgment or decree within the meaning of this section; nor shall any attachment or other process issued upon any such order, be deemed an execution within the meaning of this section. 2 *R. S.* 563, *sec.* 22; 16 *Barb.* 363.

Nor will a party who is duly committed upon a regular indictment for murder, or other criminal offense, be discharged by habeas corpus, by proving his innocence merely, however clear the proof may be, but he must abide a trial by jury, 1 *Hill*, 377; 3 *Id.* 670, *note;* 25 *Wend.* 567; though otherwise on a commitment before indictment. 1 *Park. Cr. R.* 187; *but see post.*

Where and How the Writ to be applied for.] The statute provides that the application for the writ of habeas corpus, shall be made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf. 2 *R. S.* 563, *sec.* 23. It further provides that the application shall be made, either

1. To the Supreme Court, during its sitting; or

2. During any term or vacation thereof, to the chancellor, or any one of the justices of the Supreme Court, or to any officer who may be authorized to perform the duties of a justice of the Supreme Court at chambers, being or residing within the county where the prisoner is detained; or, if there be no such officer within such county, or if he be absent, or for any cause be incapable of acting, or have refused to grant such writ, then to some officer having such authority, residing in any adjoining county. *Ib.* The like authority is also given to the Superior Court of the city of Buffalo, and to each of the justices thereof, to issue the writ within that city, *Laws of* 1857, *vol.* 1, *pp.* 752, 754; and also to the City Judge of the

city of Brooklyn, within the county of Kings, *Laws of* 1849, *p.* 174, *sec.* 26; and to the City Judge of New York, within that city. *Laws of* 1850, *p.* 388; 6 *Abb. Pr. R.* 146; *Id.* 139.

The officers authorized to perform the duties of a justice of the Supreme Court at chambers, under the Revised Statutes, were supreme-court commissioners, 2 *R. S.* 280; the judges of the Superior Court in the city of New York, *Id.* 281, *sec.* 33; 1 *Duer*, 709; the judges of the Court of Common Pleas for the city and county of New York, *Laws of* 1847, *p.* 281, *sec.* 7; 1 *Park. Cr. R.* 138; the recorders of cities and judges of the county courts being of the degree of counselor at law. 2 *R. S.* 281, *sec.* 32; 3 *How. Pr. R.* 32; *Id.* 40; *Id.* 172; *but see Id.* 92. But there are now no supreme-court commissioners, that office having been abolished by the constitution of 1846. *Art.* 14, *sec.* 8.

The authority of the chancellor to award a habeas corpus was transferred by the judiciary act, and the constitution of 1846, to the justices of the Supreme Court. 1 *Duer*, 709; 8 *How. Pr. R.* 288; 22 *Barb.* 178; 4 *Kernan*, 575. That authority does not depend solely upon the statute, but is inherent in a court of equity, and derived from the common law; though it is to be exercised in conformity to the statutory provisions here considered. *Id. ibid;* 8 *Paige*, 47; 2 *R. S.* 573, *sec.* 73, *post.*

Where the future disposition and custody of infants is to be determined, on the return to the writ, the application can only be made to the Supreme Court, or to one of the justices thereof. The application, in such case, is at the common law, and not under the statute, except in the cases authorized by *part* 2, *chap.* 8, *title* 2, of the Revised Statutes, *supra.* A judge of the Superior Court in the city of New York, can only exercise the powers which were conferred by statute upon a supreme-court commissioner; and he is not, therefore, clothed with the discretionary powers of a judge in equity in relation to the disposition and custody of infants. 1 *Duer*, 709; 8 *How. Pr. R.* 288. The same remark applies to a recorder of a city, a county judge, and a judge of the Court of Common Pleas of

the city of New York. And so, also, to a justice of the Supreme Court, even, in respect to the statutory writ of habeas corpus returnable before him at chambers. 22 *Barb.* 179. But upon a petition addressed to the Supreme Court in equity, and presented to a justice of that court, at chambers, out of term, such justice has power to entertain proceedings in relation to infants, and to make an order for their future disposition and custody. *Ib.; aff.* 4 *Kernan*, 575.

And in case of an infant too young to be capable of judging for itself, when the only question to be determined is whether such infant is improperly restrained, any of the officers above mentioned may entertain the proceedings, and if such infant is restrained, remove the restraint, by delivering such infant to its legal custodian. 1 *Duer*, 725; 22 *Barb.* 179, *supra; Hurd on Hab. Corpus*, 456 to 462.

Whenever application for the writ of habeas corpus or certiorari, shall be made to any officer not residing within the county where the prisoner shall be detained, he shall require proof by the oath of the party applying, or by other sufficient evidence, that there is no officer in such county authorized to grant the writ, or if there be one, that he is absent, or has refused to grant such writ, or for some cause to be specially set forth, is incapable of acting; and if such proof be not produced, the application shall be denied. 2 *R. S.* 563, *sec.* 24.

The application for the writ may be made by the person imprisoned, or by his agent or attorney; and so, also, by any friend of the prisoner,—and this, too, without any express or other authority for that purpose. 3 *Hill*, 654, *note*, *pl.* 7. In cases of infants, the court will generally allow any one to appear and litigate for them, in good faith, as a next friend. *Ib.* And where an infant child is illegally detained from its father, the father may properly apply for a habeas corpus in his own right, and without the privity of the child. 3 *Hill*, 399.

In cases where the writ is required in any action or matter, civil or criminal, to which the people of this State shall be parties, the application therefor may be made by the

attorney general, or district attorney, having charge of the same. 2 *R. S.* 574, *sec.* 77.

Where the application for the writ is made to the Supreme Court, it may be made either at the special or general term, 12 *Wend.* 229; 8 *How. Pr. R.* 288; and also to one of the justices thereof at chambers. *Ib.* And in either case the writ may run into any part of the State. *Id. ibid.;* 3 *How. Pr. R.* 39; see also, 3 *Hill*, 652, *note.*

Petition, and what to contain.] The writ must be founded upon petition, which must be addressed to the court or officer to whom the application is to be made; and should be signed by the party for whose relief it is intended, or by some person in his behalf. 2 *R. S.* 563, *sec.* 23, *supra.* It is in the name of the prisoner, alone, that all the proceedings must regularly be conducted. 1 *Duer*, 714; but see 1 *Park. Cr. R.* 132, 137. Though if the writ is prosecuted at the common law, by a parent or guardian, to obtain the custody and control of a child, or a ward; or by a husband for the deliverance of a wife, the proceedings may be conducted in the name of such parent, or guardian, or husband. 1 *Duer*, 714; 3 *Hill*, 399. And so, also, the proceedings may be in the name of the husband or wife under part 2, chap. 8, title 2, of the Revised Statutes. 2 *R. S.* 149, *supra.*

The statute provides that the petition shall state in substance,—

1. That the person in whose behalf the writ is applied for, is imprisoned or restrained in his liberty; the officer or person by whom he is so confined or restrained, and the place where; naming both parties, if their names are known, or describing them, if they are not:

2. That such person is not committed or detained by virtue of any process, judgment, decree, or execution, specified in the preceding twenty-second section:

3. The cause or pretense of such confinement or restraint, according to the best of the knowledge and belief of the party:

4. If the confinement or restraint is by virtue of any war-

rant, order, or process, a copy thereof must be annexed; or it must be averred, that by reason of such prisoner's being removed or concealed before the application, a demand of such copy could not be made; or that such demand was made, and the legal fees therefor tendered to the officer or person having such prisoner in his custody, and that such copy was refused:

5. If the imprisonment be alleged to be illegal, the petition must also state in what the alleged illegality consists:

6. It must specify whether the party applies for the writ of habeas corpus, or for the writ of certiorari:

7. It must be verified by the oath of the party making the application. 2 *R. S.* 564, *sec.* 25. For forms of petition, see *Appendix*, No. 70.

Where the party imprisoned or restrained is an infant, and the custody and disposition of such infant is to be determined by the proceedings, the petition, where the application is made to a justice of the Supreme Court, at chambers, should be addressed to the Supreme Court in equity, and should set forth the facts showing that the equitable powers of that court are invoked. In such case, also, the writ should be returnable before the court. 22 *Barb.* 191; *aff.* 4 *Kernan*, 575.

And where the mother, who was living in a state of separation from her husband, without being divorced, applied for the writ of habeas corpus to obtain a child of the marriage, which was in the husband's possession (2 *R. S.* 148, *sec.* 1),—it was held that a full disclosure of all the facts and circumstances in relation to the ability of both parents, would be required before allowing the writ. 2 *How. Pr. R.* 61. For different forms of petition, see *Appendix*, Nos. 70, 71, 72.

The Writ to be Granted, and Penalty for Refusal.] Any court or officer empowered to grant any writ applied for under the statute, to whom such petition shall be presented, is required to grant such writ without delay; unless it shall appear from the petition itself, or from the documents annexed,

that the party applying therefor, is, by the provisions of the statute, prohibited from prosecuting such writ. 2 *R. S.* 564, *sec.* 26. And if any court or officer, authorized by the provisions of the statute to grant writs of habeas corpus or certiorari, shall refuse to grant such writ when legally applied for, every member of such court, who shall have assented to such refusal, and every such officer, shall severally forfeit to the party aggrieved, one thousand dollars. *Id. sec.* 31; 3 *Hill*, 655, *note;* 2 *Kent's Com.* 29.

Writ may sometimes Issue without Petition.] The statute provides, that whenever the Supreme Court, or any justice thereof, shall have evidence from any judicial proceeding had before them, that any person within the county in which such court or officer shall be, is illegally confined and restrained in his liberty, it shall be the duty of such court or officer, to issue a writ of habeas corpus or certiorari for his relief, although no petition be presented or application made for such writ. 2 *R. S.* 565, *sec.* 30.

Form of Writ, and how Issued.] The court or officer having allowed the writ, it issues immediately. The form of the writ of habeas corpus, as well as the writ of certiorari, is prescribed by the statute. 2 *R. S.* 564, *secs.* 27 *and* 28. For forms, see *Appendix*, Nos. 73 and 74.

The writ may be directed to any one who has the prisoner in custody, or to one charged with participating in the illegal detention, though he be not the immediate actor in the wrong. 3 *Hill*, 406; *Id.* 655, *note, pl.* 14; 2 *R. S.* 565, *sec.* 29; *Hurd on Habeas Corpus*, 234. It may be tested, if issued in term, on any day in that term, or if issued in vacation, on any day in the preceding term, 2 *Burr. Pr.* 202, *note;* 2 *R. S.* 197, *sec.* 5; and may be made returnable at a day certain, or forthwith, as the case may require. *Ib.* 574, *sec.* 75. The place of the return must also be stated, as well as the court or officer, before whom it is returnable. *Ib.* 565, *sec.* 27. And when the application for the writ is made to the Supreme Court, or to one of the justices thereof, in cases where the

prisoner is confined in a county other than that where such court shall then be held, or officer reside, such court may, in its discretion, and such officer may, in his discretion, make such writ returnable before some other officer, authorized to issue such writ, in the county where the prisoner may be confined. *Laws of* 1837, *p.* 230; 3 *Hill*, 656, *note*, *pl.* 15.

But during the session of a court of Oyer and Terminer in any county, no prisoner detained in the common jail of such county, upon any criminal charge, shall be removed therefrom by any writ of habeas corpus, unless such writ shall have been issued by such court of Oyer and Terminer, or shall be made returnable before it. 2 *R. S.* 758, *sec.* 27; *same section in Laws of* 1847, *p.* 599, *sec.* 27.

Seal to Writs.] All writs of habeas corpus, certiorari, or discharge, issued pursuant to the provisions of the statute, are required to be under the seal of the court by which they are awarded. And if the same are awarded by any officer out of court, they shall be under the seal of the court before which the writ is made returnable, or if it be made returnable before some body other than a court of record, or before an officer out of court, it shall be under the seal of the Supreme Court. 2 *R. S.* 573, *sec.* 74.

Writ to be Endorsed.] Every such writ shall be endorsed with a certificate that the same has been allowed, and with the date of such allowance. If the writ be awarded by a court, the endorsement shall be signed by the chief justice, or other presiding officer of such court. If it be awarded by any officer out of court, the endorsement shall be signed by such officer. 2 *R. S.* 574, *sec.* 76. And whenever the writ of habeas corpus shall be required in any action or matter to which the people of this State shall be parties, on the application of the Attorney General, or District Attorney, having charge of the same, the court or officer allowing it shall also state in their endorsement of allowance, that it was issued upon such application. *Ib. sec.* 77. And so, when the writ is directed to any other than the sheriff, coroner,

constable, or marshal, and the officer allowing it shall require that the charges for bringing up such prisoner, shall be paid by the petitioner, the endorsement of allowance should specify the amount of such charges so to be paid. *Ib. sec.* 84. As to the cases in which such charges will be directed to be paid, see *post.* For forms of endorsement, see *Appendix*, No. 73.

Writ good, though Defective in Form.] Such writs of habeas corpus or certiorari, shall not be disobeyed for any defect of form. But they shall be sufficient:

1. If the person having the custody of the prisoner, be designated either by his name of office, if he have any, or by his name; or if both such names be unknown or uncertain, he may be described by an assumed appellation; and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name or description, or to another person.

2. If the person who is directed to be produced, be designated by name; or if his name be uncertain or unknown, he may be described in any other way, so as to designate the person intended. 2 *R. S.* 565, *sec.* 29.

Amendment of Writ.] The writ may be amended on motion, like any other process. 3 *Hill*, 657, *note*, *pl.* 23. (*a*).

When the Officer may require the Charges for bringing up the Prisoner to be Paid.] Every officer allowing a writ of habeas corpus, directed to any other than a sheriff, coroner, constable or marshal, may, in his discretion, require as a duty

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(*a*) At common law the writ of habeas corpus stood on the same footing with other prerogative writs, such as mandamus, quo warranto, certiorari, prohibition, &c., and was issued and dealt with upon the like general grounds and principles. 3 *Black. Com.* 132, 3; 2 *Burr.* 855. 6; 3 *Pet.* 202. Thus, as to the affidavit and motion for allowance, the form of the writ, the return, the right to question the truth of the return, the right to amend, &c., the common-law doctrine respecting other prerogative writs applied to the writ of habeas corpus, and may still be resorted to for the purpose of throwing light on the rules relating to it. 3 *Hill*, 649, *note*, *pl.* 2; 2 *R. S.* 573, *sec.* 73, *post.*

to be performed, in order to render the service thereof effectual, that the charges of bringing up such prisoner shall be paid by the petitioner; and in such case, he shall, in the allowance of the writ, specify the amount of such charges, so to be paid, which shall not exceed the fees allowed by law to sheriffs, for similar services; as to which, see under the next head. 2 *R. S.* 575, *sec.* 84.

Service of Writ, and Tender of Fees, and Bond.] Writs of habeas corpus can only be served by an elector of some county within this State; and the service thereof shall not be deemed complete, unless the party serving the same shall tender to the person in whose custody the prisoner may be, if such person be a sheriff, coroner, constable, or marshal, the fees allowed by law for bringing up such prisoner; nor unless he shall also give bond to such sheriff, coroner, constable or marshal, as the case may be, in a penalty double the amount of the sum for which such prisoner may be detained, if he be detained for any specific sum of money, and if not, then in the penalty of one thousand dollars, conditioned that such person will pay the charges of carrying back such prisoner, if he shall be remanded, and that such prisoner will not escape by the way, either in going to, or returning from, the place to which he is to be taken. *Ib.* 574, *sec.* 78. But this section is not made applicable to any case where the writ is sued out by the attorney-general, or by any district attorney. *Ib. sec.* 79. For form of bond, see *Appendix*, No. 75.

The fees of the officer for bringing up a prisoner upon habeas corpus, with the cause of his arrest and detention, are one dollar and fifty cents; and for traveling, twelve and a half cents for each mile from the jail. 2 *R. S.* 646, *and see* 7 *Cowen*, 424; *Cowen & Hill's Notes to Phil. Ev.* 19, *note* 25.

Every writ of habeas corpus or certiorari issued pursuant to the statute, may be served by delivering the same to the person to whom it is directed. If he cannot be found, it may be served by being left at the jail or other place in which the prisoner may be confined, with any under officer, or other

person of proper age, having charge, for the time, of such prisoner. 2 *R. S.* 574, *sec.* 80.

If the person upon whom the writ ought to be served, conceal himself, or refuse admittance to the party attempting to serve the same, it may be served by affixing the same in some conspicuous place, on the outside, either of his dwelling house, or of the place where the party is confined. *Ib. sec.* 81.

Duty of Officer, or Person Served.] It is the duty of every sheriff, coroner, constable, or marshal, upon whom a writ of habeas corpus shall be served, whether such writ be directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof. And it is the duty of every other person upon whom such writ shall be served, having the custody of the individual for whose benefit the writ is issued, to obey and execute such writ, according to the command thereof, without requiring any bond or the payment of any charges, unless the payment of such charges shall have been required by the officer issuing such writ. 2 *R. S.* 575, *sec.* 82; 10 *Paige*, 606; 7 *Wend.* 132.

And in like manner, it is the duty of the person upon whom any writ of certiorari, issued pursuant to the provisions of the statute, shall be served, upon payment or tender of the fees allowed by law, for making a return to such writ, and for copying the warrant or other process to be annexed thereto, to obey and return the same according to the exigency thereof. 2 *R. S.* 575, *sec.* 83.

Warrant for Prisoner, and Proceedings thereon.] Whenever it shall appear by satisfactory proof, that any one is held in illegal confinement or custody, and that there is good reason to believe that he will be carried out of the State, or suffer some irreparable injury, before he can be relieved by the issuing of a habeas corpus or certiorari, any court or officer authorized to issue such writs, may issue a warrant

under his hand and seal, reciting the facts, and directed to any sheriff, constable, or other person, and commanding such officer or person to take such prisoner, and forthwith to bring him before such court or officer, to be dealt with according to law. 2 *R. S.* 572, *sec.* 65. For forms of petition, affidavit, warrant, &c., *see Appendix, Nos.* 76, 77. When the proof mentioned in the last section, shall also be sufficient to justify an arrest of the person having such prisoner in his custody, as for a criminal offense committed in the taking or detaining of such prisoner, the warrant shall also contain an order for the arrest of such person, for such offense. *Ib. sec.* 66.

Any officer or person to whom such warrant shall be directed, shall execute the same, by bringing the prisoner therein named, and the person who detains him, if so commanded by the warrant, before the court or officer issuing the same; and thereupon the person detaining such prisoner, shall make a return, in like manner, and the like proceedings shall be had, as if a writ of habeas corpus had been issued in the first instance. *Ib. sec.* 67. If the person having such prisoner in his custody, shall be brought before such court or officer, as for a criminal offense, he shall be examined, committed, bailed, or discharged, by such court or officer, in like manner as in other criminal cases of the like nature. *Ib. sec.* 68.

When the Return to be made.] If the writ be returnable at a certain day, such return shall be made, and such prisoner shall be produced, at the time and place specified therein. If it be returnable forthwith, and the place be within twenty miles of the place of service, such return shall be made, and such prisoner shall be produced, within twenty-four hours; and the like time shall be allowed for every additional twenty miles. 2 *R. S.* 575, *sec.* 85.

Proceedings on Disobedience of Writ.] If the person upon whom such writ of habeas corpus or certiorari shall have been duly served, shall refuse or neglect to obey the same, by producing the party named in such writ of habeas corpus,

and making a full and explicit return to every such writ of habeas corpus or certiorari, within the time herein required, and no sufficient excuse shall be shown for such refusal or neglect, it shall be the duty of the court or officer before whom such writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person, directed to the sheriff of any county within this State, and commanding him forthwith to apprehend such person, and to bring him immediately before such court or officer; and on such person being so brought, he shall be committed to close custody, in the jail of the county in which such court or officer shall be, without being allowed the liberties thereof, until he shall make return to such writ, and comply with any order that may be made by such court or officer in relation to the person for whose relief such writ shall have been issued. 2 *R. S.* 566, *sec.* 34. For form of attachment and commitment, see *Appendix*, Nos. 78, 79. If a sheriff of any county shall have neglected to return such writ, the attachment may be directed to any coroner or other person, to be designated therein, who shall have full power to execute the same; and such sheriff, upon being brought up, may be committed to the jail of any county other than his own. *Ib. sec.* 35.

The court or officer by whom any such attachment may be issued, may also, at the same time or afterwards, issue a precept to the same sheriff, or other person to whom such attachment shall have been directed, commanding him to bring forthwith before such court or officer, the party for whose benefit such writ of habeas corpus or certiorari shall have been allowed, who shall thereafter remain in the custody of such sheriff or person, until he shall be discharged, bailed, or remanded, as such court or officer shall direct. *Ib. see.* 36. For form of precept, see *Appendix*, No. 80.

In the execution of such attachment or precept, or of either of them, the sheriff or other person to whom they shall be directed, may call to his aid the power of the county, as in other cases. *Ib. sec.* 37.

The Return, and what to contain.] The person or officer on whom the writ is served must make a return thereto in writing, and must also bring the body of the person in his custody, except in the case of the sickness or infirmity of such person, in which case that fact must be stated in the return of the party in whose custody he is, and verified by his oath. 2 *R. S.* 566, *secs.* 33, 49.

The return must state plainly and unequivocally,

1. Whether he have, or have not, the party in his custody, or under his power or restraint;

2. If he have the party in his custody or power, or under his restraint, the authority and true cause of such imprisonment or restraint, setting forth the same at large;

3. If the party be detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ, to the court or officer before whom the same is returnable;

4. If the person upon whom such writ shall have been served shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly, to whom, at what time, for what cause, and by what authority, such transfer took place.

The return must be signed by the person making the same; and, except where such person shall be a sworn public officer, and shall make his return in his official capacity, it shall be verified by his oath. *Ib. sec.* 32. For forms of return, see *Appendix*, No. 81.

To excuse the non-production of the body, the return must be, not only that the prisoner is not in the defendant's custody, but also, that he is not in his possession or power. 10 *Johns.* 328, 331; *see also* 3 *Hill*, 657, *note*, *pl.* 24; 11 *Mass.*, 83.

But whenever, from the sickness or infirmity of the person directed to be produced by any writ of habeas corpus, such

person cannot, without danger, be brought before the court or officer before whom the writ is made returnable, the party in whose custody he is, may state that fact in his return to the writ, verifying the same by his oath. 2 *R. S.* 569, *sec.* 49. Where the return of commitment is made by a sheriff, it will be construed liberally. 1 *Hill*, 154.

Notice to Parties Interested.] When it appears, from the return to the writ, that the party named therein is in custody on any process, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge until it shall appear that the party so interested, or his attorney, if he have one, shall have had the like notice of the time and place at which such writ shall have been made returnable, as is required to be given of special motions in the Supreme Court. 2 *R. S.* 569, *sec.* 46. For form, see *Appendix*, No. 82.

The notice, therefore, must be served at least eight days before the time appointed for the hearing, where it is personally served; and when served by mail, double that time is required. *Code of Pro.* §§ 412, 413; 1 *Burr. Pr.* 336, 352. Service by mail is authorized where the parties interested or their attorneys reside in different places, between which there is a regular communication by mail. The service, in such case, is made by inclosing the notice in a wrapper, and putting the same in the post-office, directed to the party or his attorney, at his place of residence, and paying the postage on the letter. *Ib.; and see Code*, § 410.

The notice must be given notwithstanding the party interested does not reside in the county where the party intended to be relieved resides, or where the proceeding is had for a habeas corpus. The party interested is entitled to notice, without regard to his residence. 14 *Wend.* 48. But it is not necessary to serve with the notice a copy of the petition or other paper upon which the writ is granted. 12 *Id.* 229.

Notice to District Attorney.] When it appears from the return that such party is detained upon any criminal accusa-

tion, such court or officer shall make no order for the discharge of such party, until sufficient notice of the time and place at which such writ shall have been returned, or shall be made returnable, shall be given to the district attorney of the county in which the person prosecuting the writ shall be detained; and no notice to any other district attorney shall be necessary. 2 *R. S.* 569, *sec.* 47, *as amended by Laws of* 1837, *p.* 231; 5 *Hill*, 169. For form of notice, see *Appendix*, No. 83.

Notice is equally important in many cases other than those provided for by the statute, and should doubtless be required. *See* 3 *Hill*, 657, *note*, *pl.* 22; *Hurd on Habeas Corpus*, 230.

Amendment of the Return.] The court may, in its discretion, allow an amendment of the return at any time before the case is decided, where it appears to be necessary to the ends of justice. *Hurd on Hab. Corpus*, 262. The amendment may be either in form or substance, 10 *Mod.* 102; and if it be not true, the person who makes the return is in the same peril as if the fact had been originally returned. *Ib.* The amendment must be by the one who made the defective return. 3 *Hill*, 657, *note*, *pl.* 25, *and see ante*, *p.* 109, *note.*

Staying the Proceedings.] The court will not stay the proceedings on a habeas corpus because the costs of a former proceeding in the same matter remain unpaid. 3 *Hill*, 399. And, it seems, the rule is the same, in this respect, whether the proceeding in which the objection is taken be regarded as at the common law, or under the statute. *Ib.*

Proceedings on the Return of the Writ.] The sole basis of the statutory provisions relating to the writ of habeas corpus being an illegal imprisonment or restraint, the only authority of an officer acting under it is, to *discharge*, *bail*, or *remand* the person on whose behalf the writ is issued. 1 *Duer*, 709.

It is provided by the statute, that the court or officer before whom the party shall be brought, on such writ of habeas

corpus, shall, immediately after the return thereof, proceed to examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same shall have been upon commitment for any criminal, or supposed criminal, matter or not. 2 *R. S.* 567. *sec.* 38.

Where the facts set forth in the return are admitted, or are not denied, the law of the case, alone, is to be inquired into; and the proceeding is the same as if the return were formally demurred to. 3 *Hill*, 658, *note*, *pl.* 28; 1 *Park. Cr. R.* 129; 4 *Barb.* 31. But if issue is taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or officer is to proceed in a summary way to hear the allegations and the proofs of the parties, and to dispose of such party as the justice of the case may require. 2 *R. S.* 569, *sec.* 48, *post*, *p.* 121.

Prisoner, when Discharged.] If no legal cause is shown for the imprisonment or restraint of the party, or for the continuation thereof, the court or officer is required to discharge such party from the custody or restraint under which he is held. 2 *R. S.* 567, *sec.* 39. For form of discharge, see *Appendix*, No. 84.

But if it appear on the return, that the prisoner is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such prisoner can only be discharged in one of the following cases:

1. Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person;

2. Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged;

3. Where the process is defective, in some matter of substance required by law, rendering such process void;

4. Where the process, though in proper form, has been issued in a case not allowed by law;

5. Where the person having the custody of the prisoner under such process, is not the person empowered by law to detain him; or,

6. Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law. 2 *R. S.* 568, *sec.* 41; 3 *Hill*, 661, *note*, *pl.* 31 *to* 37.

But if the party be illegally arrested or detained, even though the process be valid, this is ground for discharge. 3 *Hill*, 666, *note*, *pl.* 39, *and cases*. And so, where there are two causes of imprisonment, one valid and the other invalid, the court may, on habeas corpus, discharge as to the invalid cause, and remand the prisoner as to the other. 7 *Cowen*, 472.

Where the imprisonment is under actual process, valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burden of impeaching its validity by showing a want of jurisdiction in the magistrate or court whence it emanated. 3 *Hill*, 661, *note*, *pl.* 31; 1 *Sand. S. C. R.* 702; 2 *Parker's Cr. R.* 650. And if he fail in thus impeaching it, his body will be remanded to custody. Error, irregularity, or want of form, is no objection; nor is any defect which may be amended or remedied, by a further entry on motion. 3 *Hill*, 661, *note*, *pl.* 31 *and* 38, *and cases there cited*; 1 *Barb. S. C. R.* 193; 3 *Id.* 37; *Id.* 162; 1 *Hill*, 154; 18 *Johns.* 305.

And in general, the examination, where the imprisonment is on civil process, regular and valid on its face, will be confined to the jurisdiction of the court which issued it, and to the inquiry whether some event has not since occurred to entitle the prisoner to his discharge. *Id. ibid.*; 1 *Park. Cr. R.* 196. And, it seems, in determining the question of jurisdiction, the court may look into the affidavits on which the process is founded, so far as to see that the judge had colorable proof to authorize such process. 1 *Barb. S. C. R.* 349.

When the commitment is irregular, to enable the officer to remand a prisoner the testimony, showing that he is guilty of the offense charged, must be produced on the return of

the writ or at the hearing thereon. And it is too late to present such testimony on a subsequent day, when the judge announces his decision to discharge the prisoner. 1 *Sand. S. C. R.* 702.

Prisoner, when Remanded.] It is made the duty of the court or officer forthwith to *remand* such party, if it shall appear that he is detained in custody, either,

1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

2. By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree; or,

3. For any contempt specially and plainly charged in the commitment, by some court, or officer, or body, having authority to commit for the contempt so charged; and,

4. That the time during which such party may be legally detained has not expired. 2 *R. S.* 567, *sec.* 40. For form of order, directing prisoner to be remanded, see *Appendix*, No. 85.

And so, if it appear that the party has been legally committed for any criminal offense, or if he appear by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offense, although the commitment be irregular, the court or officer before whom such party shall be brought, if the case be not bailable, or if bailable and good bail be not offered, shall forthwith remand such party. *Id.* 568, *sec.* 43; 5 *Cowen*, 39; 3 *Hill*, 666, *note pl.* 40; 1 *Sand. S. C. R.* 708; 3 *Park. Cr. R.* 562.

And when a party, committed for refusing to be sworn, or to answer, in cases of insolvency, shall bring a writ of habeas corpus, he shall not be discharged by reason of any insufficiency in the form of the warrant of commitment; but the court or officer before whom such person shall be brought, shall re-commit such person, unless it shall be made to appear that he has answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case

may be; or unless such person shall then answer, on oath, the questions so put to him. 2 *R. S.* 44, *sec.* 15.

But no court or officer, on the return of any habeas corpus or certiorari, shall have power to inquire into the legality or justice of any process, judgment, decree or execution, specified in the preceding twenty-second section, (*ante, p.* 101); nor into the justice or propriety of any commitment for a contempt made by any court, officer or body, according to law, and charged in such commitment, as herein provided (*ante, sec.* 40, *sub.* 3). 2 *R. S.* 568, *sec.* 42; 2 *Park. Cr. R.* 650, *reversing* 1 *Id.* 588; 16 *Barb.* 363; 1 *Abb. Pr. R.* 210; 8 *How. Pr. R.* 478; 1 *Hill*, 154; 5 *Id.* 164; 10 *Paige*, 284; 11 *How. Pr. R.* 425; 15 *Barb.* 162; 1 *Duer*, 696; 3 *Hill*, 651, 662, *note, pl.* 3 *and* 38.

But on a commitment by final process upon a summary conviction, the court or officer may examine the record of conviction; and if it be void, he may discharge the prisoner. 1 *Park. Cr. R.* 195, *and cases there cited.* Indeed, final process may in all cases be impeached by showing either that there was no judgment, decree, or conviction on which it is founded; or, that the judgment, &c., is absolutely void, *Id. ibid;* or, that the judgment does not show a case authorizing the execution on which the defendant is arrested. 15 *How. Pr. R.* 210; *s. c.* 6 *Abb. Pr. R.* 37.

And even where the imprisonment is under the asserted authority of the United States, when in fact there is no real authority, the court has jurisdiction, and may discharge the prisoner. 3 *Hill*, 651, *note; and see* 6 *Johns.* 337.

Whether the affidavits upon which an attachment for contempt is issued, are sufficient to warrant the officer in issuing it, is a matter that cannot be reviewed on habeas corpus. 2 *Sand. S. C. R.* 729; *s. c.* 4 *How. Pr. R.* 373; 1 *Barb. S. C. R.* 340; *and see* 7 *Abb. Pr. R.* 96. If the officer in such case erred, it was an error of judgment as to the sufficiency of the evidence, to be corrected on motion or by appeal. *Id. ibid.*

And where the return to a habeas corpus showed that the prisoner was detained under a commitment for contempt

as a witness in refusing to answer questions relating to a criminal complaint, it was held that the officer before whom the writ was returnable had no right to inquire into the truth of the facts adjudged by the committing magistrate; nor whether the questions put to the witness were proper; nor whether he was privileged from answering. 5 *Hill*, 164; *see also*, 11 *How. Pr. R.* 418. But the officer may inquire, whether in truth there is any process of commitment, and whether it is valid upon its face; and he may also inquire whether any cause has arisen, since the commitment, for putting an end to the imprisonment. *Id. ibid; see also*, 8 *How. Pr. R.* 478; 3 *Hill*, 666, *note*, *pl.* 39; 2 *Park. Cr. R.* 650; 7 *Abb. Pr. R.* 96. And, it seems, he may also inquire whether the magistrate had jurisdiction; and this, too, notwithstanding the commitment recites the necessary facts to give jurisdiction. 5 *Hill*, 164, *supra*. "No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends." *Ib.* 168, per Bronson, J.; *and see* 5 *Abb. Pr. R.* 281; 15 *How. Pr. R.* 210. See further on this subject, under the next head, *post;* and see, also, under the next preceding head.

Proceedings if Return is denied or avoided.] The statute provides that the party brought before the court or officer, on the return of any writ of habeas corpus, may deny any of the material facts set forth in the return, or allege any fact, to show either that his imprisonment or detention is unlawful or that he is entitled to his discharge; which allegations or denials shall be on oath; and thereupon such court or officer shall proceed in a summary way, to hear such allegations and proofs as may be produced in support of such imprisonment or detention, or against the same, and to dispose of such party as the justice of the case may require. 2 *R. S.* 569, *sec.* 48.

The courts and judges have not concurred in the proper construction to be given to the above section; especially, as to whether a court or officer, under it, may go behind the warrant on which the prisoner is detained, and inquire from

facts *aliunde* the return, into the legality of the imprisonment.

It is stated in the *Notes* to 3 *Hill*, 658 (*pl.* 30), that "where the return shows that the party is detained on process, the existence and validity of the process are the only facts upon which issue can be taken. These alone are the 'material facts' within this section—not whether the process was founded on sufficient evidence, or any evidence at all." (*a*) And again, the statute was not intended "as an authority to inquire into the validity of writs, warrants or other process, further than to ascertain whether they will protect the party suing them out, or the officer serving or executing them." "When the process is sufficient to protect the party and officer, the imprisonment is lawful, and must be relieved against by direct proceeding—*e. g.*, a writ of error, certiorari, motion, &c." *Ib.* 659.

And so, in *The People* v. *McLeod* (1 *Hill*, 337; *see also* 25 *Wend.* 483, 570), the court say that this section was not intended to give a prisoner the right of summary trial as to the question of guilt or innocence; but only to enable him, by evidence *aliunde* the return, to dispute the fact of his being detained on the process or proceeding set forth, or to impeach it for lack of jurisdiction, or to show that by some subsequent event (*e. g.* a pardon, reversal of judgment, &c.), it has ceased to be lawful cause of detention. And accordingly, it was held, in that case, that a party duly committed upon a regular indictment for murder, cannot be discharged upon habeas corpus, by proving his innocence, merely, however clear the proof may be. *Ib.* 377.

And so, the question, whether a former trial and conviction are a bar to an indictment subsequently found for murder alleged to have been previously committed, cannot be

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(*a*) "If this is so, then is the principle of *Cable* v. *Cooper*, 15 *Johns. R.* restored, the act of 1818, reversing that case, rendered nugatory, and section forty-eight of our habeas corpus law shorn of very much of its benignant power. But it is not so." Per Edmonds, J., 1 *Park. Cr. R.* 194, *post, p.* 124.

raised and made a ground for discharge on habeas corpus. 3 *Park. Cr. R.* 126.

And so, in a proceeding under the statute, before a county judge at chambers, where a pardon was alleged in answer to a return on habeas corpus, and it was sought to avoid the effect of such pardon by showing that it had been fraudulently obtained; it was held that the court or officer could not go behind the pardon to inquire into the regularity of the proceedings; and this, too, notwithstanding that it was apparent in that case that the pardon had been obtained by gross fraud and misrepresentation. 8 *How. Pr. R.* 478. In proceeding under the writ, the officer is "confined to jurisdictional questions, and to what may be called the *prima facie* appearance of the proceedings, without raising any collateral issues, and without any impeachment of records, deeds, or papers fair on their face, and with the sole object of inquiring whether the party is legally detained." *Ib.* 483.

And, per Bronson, J., in *The People* v. *Cassels* (5 *Hill*, 168), the forty-eighth section was mainly, if not solely intended, for cases where the party is restrained of his liberty without the authority of legal process. "In such cases," he observes, "the return is usually made by a person having an interest in the question, and who has exercised the restraint upon his own responsibility, as the parent, husband, master, or guardian of the person imprisoned; and it is very proper that the facts which they state in the return should be open to investigation. But it is otherwise when the return is made by an officer having legal process." *Ib.*

And so, in the *Matter of Prime* (1 *Barb. S. C. R.* 340), where the relators were detained on civil process, it was held that the court could not look beyond the colorable authority of the judge who issued the warrant. And per Mason, J., in that case (*p.* 350), after considering the 48th section, *supra:* "The general provisions of this habeas corpus act show most clearly that it was never intended as a writ of review to correct the errors of inferior tribunals."

See, also, substantially to the same effect with the

authorities cited above, 1 *Barb. S. C. R.* 193, per Edwards, J.; 4 *Id.* 33, per Willard, J.; 3 *Park. Cr. R.* 541, per Clerke, J.

The above cases and authorities, or most of them, as well as the practice in England and in the United States Supreme Court, are reviewed and considered by Edmonds, J., in *The People* v. *Martin*, (1 *Park. Cr. R.* 187.) The prisoners, in that case, were detained on a warrant of commitment for trial on a charge of grand larceny; and on application for their discharge on the ground that they were innocent of the crime alleged, it was held, contrary to the tenor of the cases and authorities cited *supra*, that the whole question of guilt or innocence, on a commitment before indictment, was open for examination on the return to the writ; and that in such cases, under the statute, the proceedings on a habeas corpus are in the nature of an appeal from the decision of the committing magistrate. But that in criminal cases where an indictment has been found, the rule is otherwise; though, it seems, that rule does not deny the *power* of the court to look beyond the commitment after indictment, but only that the court will not exercise that power unless there are good reasons for doing so,—*e. g.*, where the party is discharged or bailed, after delay in bringing an indictment to trial. *Ib.* 191; *and see also*, *Ib.* 440; 3 *Hill*, 651 *and* 670, *notes*. *Hurd on Hab. Corpus*, 287. See also, the case of *The People* v. *Tompkins* (1 *Park. Cr. R.* 224), where the same question is again considered by Justice Edmonds, and additional authorities cited and reviewed. "I have always understood," he observes, "that it was the intention to give to a party committed for a crime by an examining magistrate, an appeal from his commitment to the higher judges, by virtue of the writ of habeas corpus, and such has uniformly been my practice; and the practice is abundantly sanctioned by authority and statute." *Id.* 235, citing 3 *Hill*, 665, *&c.*, *note*, *pl.* 38, 39, 40, 43, 45; 1 *Chitty's Cr. Law*, 128; 4 *Cranch*, 125; 5 *Cowen*, 51; 1 *Barb. S. C. R.* 349, *supra;* 3 *Peters*, 202; 2 *Kent's Com.* 28, 31. And see, also, 1 *Barb. S. C. R.* 267; 1 *Park. Cr. R.* 436; 18 *Wend.* 640.

Where a person had been arrested as a fugitive from

justice, and was afterwards brought before a justice of the Supreme Court on habeas corpus, for the purpose of inquiring into the cause of his detention,—it was held proper for the justice to look behind the warrant, for the purpose of ascertaining whether the officer had jurisdiction to issue it. 1 *Park. Cr. R.* 429; 1 *Barb. S. C. R.* 249; 1 *Sand. S. C. R.* 702. But in such case the court will not inquire as to the probable guilt of the accused, but only whether he has been properly "charged" with guilt. The place of the inquiry in respect to the guilt, is where the offense is charged to have been committed. 9 *Wend.* 220; *and see* 12 *Id.* 323, 325.

The issue joined upon the return to the writ, must be tried by the court or officer before whom the proceeding is pending; and such court or officer has no power to order a reference for that purpose. *Matter of Smith*, per Davis, J., New York Sp. Term, Nov., 1857.

The party brought up on the habeas corpus, is not a competent witness to support the application for his discharge, 5 *Hill*, 17; *and see Hurd on Hab. Corpus*, 306; and the Code of Procedure has not changed the rule in this respect. *Code* § 471; 1 *Park. Cr. R.* 169; *and see* 2 *Brad. R.* 224; 16 *Barb.* 201; 10 *How. Pr. R.* 83; 5 *Abb. Pr. R.* 212; 1 *Selden*, 383.

The inquiry on the traverse to the return being summary, the court will in general, permit the parties to introduce affidavits in support of the imprisonment or detention, or against the same. In respect to this point, Mr. Hurd, in his treatise, after reviewing the authorities on the subject of proofs by affidavit, states the following conclusions, as warranted by the practice, in the absence of statutory provisions on the subject, viz: 1. Affidavits, if taken before competent authority and properly authenticated, though taken without notice to the adverse party, may be received. 2. The question of their reception is addressed to the sound discretion of the court, to be exercised upon the circumstances of each case. 3. In examinations relating to criminal charges, the personal attendance of the witnesses will be required, unless it be shown that it could not be obtained by the exercise of reasonable diligence. 4. This species of evidence is of the

lowest admissible grade, and therefore is to be received cautiously and scrutinized closely. *Hurd on Hab. Corpus*, 323.

The prisoner may prove the writings or documents on which his arrest is founded, and what they contain, by the best evidence at hand, or which he can procure with reasonable diligence, without regard to the ordinary rules of evidence. 1 *Sand. S. C. R.* 702, *supra; Hurd on Hab. Corpus*, 304.

Where the material facts alleged in the return, are not denied by the party brought up, they will be taken to be true. 1 *Park. Cr. R.* 129; 3 *Hill*, 658, *note, pl.* 28; 25 *Wend.* 98.

The process by which the prisoner is detained, being valid on its face, the burthen of proving the defects alleged in the traverse, or the facts therein stated, rests upon him. 1 *Sand. S. C. R.* 702; 2 *Park. Cr. R.* 650.

Custody and Disposition of Infants.] The writ of habeas corpus, as we have seen, issues at the instance of a parent and a guardian for the custody and disposition of a child or a ward. In such cases the writ issues at the common law, and not under the statute, except in the cases provided for by *part* 2, *chap.* 8, *title* 2, of the Revised Statutes, the provisions of which are stated *post;* and except, also, in the case of an infant too young to be capable of determining for itself. 1 *Duer*, 725; 22 *Barb.* 179, *aff.* 4. *Kern.* 575; *and see Hurd on Hab. Corpus*, 454, 562.

The father, as a general rule, is entitled to the custody of his infant child; and where differences exist between the parents, the right of the father will be preferred to that of the mother. *Willard's Eq. Jur.* 618; 18 *Wend.* 637; 19 *Id.* 16; 24 *Barb.* 521. Accordingly, on habeas corpus by the husband against the wife and her father, to obtain the custody of his infant daughter, the court enforced the husband's claim as paramount, though the daughter was less than five years old, and of feeble constitution. 3 *Hill*, 400. But where the parties live apart, under a voluntary separation, the custody of an infant of tender age will be given to the mother, wherever it appears that the interest of the infant demands it. So held in the case of an infant which was but twenty-

one months old. 25 *Wend.* 64; 8 *Paige*, 48. And so, the right of the husband may be lost by ill usage, or immoral principles or habits, on his part; or by his inability to provide for his child. *Wil. Eq. Jur.* 618; 18 *Wend.* 637; 19 *Id.* 16; 24 *Barb.* 521.

Where the child is too young to be capable of determining for itself, the court or officer determines for it; and in doing so, though the natural rights of the parents are not to be disregarded, yet the future welfare of the child is chiefly, if not exclusively, to be had in view. 6 *Barb.* 366; 22 *Id.* 178, *aff.* 4 *Kernan*, 575; 8 *Paige*, 48; 13 *Johns.* 418; *Hurd on Hab. Corpus*, 462. And where such child is old enough to understand its own wishes, and those wishes lead to no improper custody, the court will interfere so far as to permit it to go where it pleases. 1 *Sand. S. C. R.* 672; 8 *Johns.* 329; 8 *How. Pr. R.* 288.

But the rule stated above, as to the right of the father to be preferred to the mother in the custody of an infant child, does not apply in cases of bastardy. In such cases the putative father has no legal right to the custody of the child. The mother, as its natural guardian, is bound to maintain it, and is entitled to the control of it. But whether in such case, the court on application of the mother, will deliver the child to her, rests in its discretion, to be exercised in all cases in view of the safety and welfare of the child. 6 *Barb.* 366; 15 *Id.* 247; *Clarke Ch. R.* 154; *Hurd on Hab. Corpus*, 462, 521.

The detention of a child of tender years amounts to legal restraint, when the individual having it in custody, without coercion, interferes by influence over its affections, or studiously guards and keeps it beyond the reach of the father, or endeavors to maintain a determination in the child not to go to its father, or prevents the father from exercising his parental authority of coercion over it. And where a child, nine years of age, was thus improperly restrained, it was held to be the duty of the court not only to remove the restraint, but to render a judgment which should dispose of its custody. 8 *How. Pr. R.* 288. And see the same case in 1 *Duer*, 709.

It is provided by statute, that when any husband and wife

shall live in a state of separation, without being divorced, and shall have any minor child of the marriage, the wife, if she be an inhabitant of this State, may apply to the Supreme Court for a habeas corpus, to have such minor child brought before it. 2 *R. S.* 148, *sec.* 1. On the return of such writ, the court, on due consideration, may award the charge and custody of the child, so brought before it, to the mother, for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require. *Ib.* 149, *sec.* 2. At any time after the making of such order, the Supreme Court may annul, vary, or modify the same. *Ib. sec.* 3.

The application for the habeas corpus, under the above statutory provisions, must be made to the Supreme Court; and a justice of that court, or a county judge, has no jurisdiction to grant the writ. 24 *Barb.* 521. The application is addressed to the discretion of the court; and, before granting it, the court will require a full disclosure of all the facts and circumstances in relation to the ability of both parents to provide for the child. 2 *How. Pr. R.* 61; 18 *Wend.* 637; *see, also*, 8 *Paige*, 48; *Hurd on Hab. Corpus*, 500 *to* 520. For form of petition, see *Appendix*, No. 72.

It seems the court will exercise the power here conferred, only in cases of separation of husband and wife by consent, or where the separation takes place in consequence of ill-usage on the part of the husband; and not where the wife withdraws from the protection of the husband and lives separate from him without any reasonable excuse. 19 *Wend.* 18, per Nelson, Ch. J. And it seems, too, that a separation, without consent, would not be approved, except under circumstances which would authorize a court of equity to decree a divorce *a vinculo matrimonii*, or *a mensa et thoro*. *Ib.* 19.

It is also further provided, by statute, that whenever application shall be made to one of the justices of the Supreme Court, by any husband or any wife, representing that his wife or her husband, has attached himself or herself to the society of Shakers, and detains a child of the marriage between them, the officer shall inquire into the circumstances;

and if satisfied by due proof of the facts represented, he shall allow a writ of habeas corpus to bring such child before him. 2 *R. S.* 149, *sec.* 4. When such child is brought before the officer he is authorized to award the charge and custody thereof to that parent who shall not have joined the society of Shakers, for such time, under such regulations, and with such provisions and directions, as he shall deem proper. Every such order may at any time, on sufficient cause shown, be annulled, varied, or modified by the officer who made the same; or in case of his being absent, or not exercising the duties of the office, then by any other officer who might originally have made such order. *Ib. sec.* 6. (*a*)

In proceeding under these statutory provisions relating to infants, it would be proper, on the return to the writ, to follow the practice prescribed by the forty-eighth section, *supra.* The court or officer will proceed in a summary way, and hear the allegations and proofs of the parties. The relator will be permitted to deny the material facts set forth in the return, and to allege other facts in support of the original application; and the respondent will also be at liberty to give further evidence on his part. 18 *Wend.* 640. And in general the proceedings are to be conducted in conformity to the several provisions of the statute herein considered, so far as the same are applicable. *Ib., and* 2 *R. S.* 575, *sec.* 86.

(*a*) The following sections of the statute have reference to the same subject:

If, upon the return of any writ of habeas corpus, so issued, it shall appear that any child therein mentioned can not be found, and satisfactory proof be made to the officer issuing such writ, that such child is secreted or concealed by or among any society of Shakers, in this State, he may issue his warrant, directed to the sheriff of the county where the said child is suspected to be, commanding such sheriff, in the day time, to search the dwelling houses and other buildings of such society, or of any members thereof, or any other building or dwelling house specified in the warrant, for such child, and to bring him before such officer; and the sheriff shall forthwith execute such warrant. 2 *R. S* 149, *sec.* 5.

If any member of the society of Shakers, or any other person, shall send or carry, or cause to be sent or carried, any such child out of this State, or shall secrete such child, or cause such child to be secreted, within this State, so that such writ can not be executed, the person so offending shall be deemed guilty of

Whether on a proceeding by a husband against the wife, or the wife against the husband, to obtain the custody of an infant child of the marriage, the wife or husband may be received as a witness to testify for or against the application, has not been expressly determined. Though in a case where the writ was directed to the wife's father, requiring him to bring before the court the wife and infant child of the relator alleged to be detained from him by the respondent, it was held that the wife was a competent witness for the respondent, to prove acts of cruelty committed by her husband upon her, which justified her separation from him and her refusal to return to his house. 8 *Paige*, 47. She would not, however, be permitted to testify as to his general character, or as to any misconduct of his in other respects. *Ib.; and see* 18 *Wend.* 642, per Bronson, J.; *Hurd on Hab. Corpus*, 307.

When Prisoner to be Bailed, or Remanded.] The statute provides, that if it appear that the party has been legally committed for any criminal offense, or if he appear by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offense, although the commitment be irregular, the court or officer before whom such party shall be brought, shall proceed to let such party to bail, if the case be bailable, and good bail be offered; or if not, shall forthwith remand such party. 2 *R. S.* 568, *sec.* 43; 3 *Hill*, 666, *note*, *pl.* 40, *and cases there cited.* For form of bail bond, see *Appendix*, No. 87.

Whether the party will be admitted to bail, is in the discretion of the court or officer before whom the prisoner is brought. That discretion, however is a judicial one, not dependent upon individual caprice, or upon public or private opinion, but upon the cases previously adjudged and determined. And the court will exercise its discretionary powers, and admit to bail, in all cases, capital or otherwise, when from the testimony against the prisoner, it is doubtful whether

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a misdemeanor, and on conviction, shall be fined not exceeding two hundred dollars, or be imprisoned not more than six months, or both. *Ib. sec.* 7.

he is innocent or guilty,—in other words, when, upon an examination of the testimony, the presumption of guilt is not strong. 10 *How. Pr. R.* 567; 5 *Cowen*, 39; 3 *Park. Cr. R.* 316. But not, where, upon a full and impartial preliminary examination, there is good reason to believe the prisoner is guilty. 3 *How. Pr. R.* 251. Though, where the offense charged and the circumstances are such that a bail bond will afford a reasonable assurance that the prisoner will appear to stand trial, it seems it is his right that the bond should be accepted in lieu of his personal detention. And in determining whether adequate security by bond may be given for his appearance, the court or officer will consider the nature of the offense charged, the probabilities of conviction, the penalty to follow it, and the position, sex, social and family relations, and pecuniary means of the accused. 3 *Park. Cr. R.* 520, per Peabody, J. And see the same case at the general term, First District, where the decision was reversed, but not in respect to the point above stated. *Id.* 531, *post.*

And so, after the party has been convicted of the offense charged, if it appears that his conviction was unjust, or that there is serious doubt of his guilt, his application for bail will be granted. 2 *Barb. S. C. R.* 450. And he may apply to be let to bail, in such case, it seems, even after his conviction has been adjudged by the Supreme Court to be legal; though, in that case, if the application is made to a judge at chambers, it will be very cautiously entertained, and only granted in cases of great question and difficulty. *Ib.*

Though the action of the committing magistrate or court, on the application to admit to bail, may be reviewed by an appellate jurisdiction, yet it is final as to other magistrates or courts of co-ordinate or concurrent authority on the same question. 3 *Park. Cr. R.* 531, *rev'g Id.* 520. But where bail has been refused by reason of the insufficiency of the security, the decision does not preclude a new application for a discharge on offering other bail. *Ib.*

See further on the subject of bail in criminal cases, 1 *Hill*, 376; 8 *Barb.* 158; 2 *Park. Cr. R.* 570; 3 *Id.* 316; and

see also, *Hurd on Hab. Corpus*, 430, *and* 3 *Hill*, 667, *notes*, *pl.* 41 to 48, *and cases cited;* and see 2 *R. S.* 704; *Id.* 728; *and post*, *p.* 137, "Bail on return to Certiorari." And see the special provisions applicable to the city of New York, *Laws of* 1844, *p.* 475, *post.*

If the party be not entitled to his discharge, and be not bailed, the court or officer shall remand him to the custody or place him under the restraint from which he was taken, if the person under whose custody or restraint he was, be legally entitled thereto; if not so entitled, he shall be committed by such court or officer to the custody of such officer or person as by law is entitled thereto. 2 *R. S.* 568, *sec.* 44; 3 *Hill*, 675, *note*, *pl.* 49.

Custody of Prisoner.] Until judgment be given upon the return, the court or officer before whom such party shall be brought, may either commit such party to the custody of the sheriff of the county in which such court or officer shall be, or place him in such care or under such custody as his age and other circumstances may require. 2 *R. S.* 568, *sec.* 45.

The statute does not authorize the officer issuing the writ of habeas corpus to permit the prisoner to go at large until the decision of the case upon the return. 10 *Paige*, 606. (*a*) Where a defendant imprisoned in execution, is brought up on habeas corpus, the sheriff is liable for an escape if he voluntarily suffers the prisoner to go at large without restraint. *Ib.* 610. He is not bound, however, to keep the prisoner always in sight, or with the same strictness as before; and if the prisoner, of his own will, should go about, for a short time, on his own business, and out of view of the sheriff, it is not an escape. The habeas corpus relieves the prisoner, temporarily, from the duress of imprisonment under the execution; and he is not then enduring the restraint created

(*a*) See this case as to the duty of the sheriff, or other officer, on the execution of process on habeas corpus; and see also 18 *Johns.* 48; *and Cow. & Hill's Notes to Phil. Ev.* 19, 20.

by the execution, with a view of coercing payment. 18 *Johns.* 51; 7 *Wend.* 132; *Hurd on Hab. Corpus*, 324.

How far Parties are Concluded by a Decision on Habeas Corpus.] An adjudication of a court or officer having authority to issue and decide upon a writ of habeas corpus may be set up as *res adjudicata*, and is conclusive upon the same parties in all future controversies relating to the same matter, and upon the same state of facts. 1 *Parker's Cr. R.* 129; 25 *Wend.* 64; *and see* 12 *How. Pr. R.* 550; 2 *Abb. Pr. R.* 346, *note.*

In a case where a father obtained a habeas corpus for his infant child detained by its mother, on the return to the writ it appeared that a previous writ had been issued, upon which an order was made refusing to interfere; it was held *prima facie* a bar to the subsequent writ. 25 *Wend.* 64, *supra.* Afterwards (about a year and six months), the father instituted another proceeding of a like character; and it was held that the former proceedings were not a bar after the circumstances had so far changed, by reason of the child's greater age, as to render it proper, beyond all reasonable doubt, that the father's paramount right should be enforced. 3 *Hill*, 400, 415; *and see Ib.* 675, *note, pl.* 51; *Hurd on Hab. Corpus*, 463.

And so, the action of a committing magistrate or court, on the question of admitting to bail, is final as to other magistrates or courts of co-ordinate or concurrent jurisdiction on the same question. 3 *Park. Cr. R.* 531, *rev'g Id.* 520. Otherwise, however, where bail has been refused on account of insufficiency, and other bail is offered on the second application. *Ib.*

Prisoner not to be Re-committed for Same Cause.] No person who has been discharged by the order of any court or officer, upon a habeas corpus or certiorari, issued pursuant to the provisions of the statute, shall be again imprisoned, restrained, or kept in custody, for the same cause; but it shall not be deemed the same cause,—

1. If he shall have been discharged from a committment on a criminal charge, and be afterwards committed for the same offense by the legal order or process of the court wherein he shall be bound by recognizance to appear, or in which he shall be indicted or convicted for the same offense; or

2. If, after a discharge for defect of proof, or for any material defect in the commitment, in a criminal case, the prisoner be again arrested on sufficient proof, and committed by legal process for the same offense; or,

3. If, in a civil suit, the party has been discharged for any illegality in the judgment or process herein before specified, and is afterwards imprisoned by legal process for the same cause of action; or,

4. If, in any civil suit, he shall have been discharged from commitment on *mesne* process, and shall be afterwards committed on execution in the same cause, or on *mesne* process in any other cause, after such first suit shall have been discontinued. 2 *R. S.* 571, *sec.* 59; 1 *Sand. S. C. R.* 702; 3 *Hill*, 675, *note*, *pl.* 50; *Hurd on Hab. Corpus*, 557 *to* 561.

And where a supreme-court commissioner, after a party had been imprisoned for the non-payment of a fine, granted a habeas corpus, and on the return thereto, released the prisoner from custody on the ground of his having been discharged under the bankrupt law,—it was held that the order was a nullity, and that the court which imposed the fine might direct a re-commitment. 10 *Paige*, 284, *aff.* 7 *Hill*, 301, *aff.* 7 *How. U. S. R.* 21; 4 *Johns.* 317; 5 *Id.* 282; *s. c.* 9 *Id.* 395; 15 *Id.* 152. And, it seems, that in all cases where the officer discharges a party on habeas corpus, without having jurisdiction to do so, the discharge is void, and the party may be re-committed for the original cause. *Id. ibid.*; 7 *Hill*, 304.

Penalty for Re-committing.] If any person, either solely, or as a member of any court, or in the execution of any order, judgment or process, shall knowingly recommit, imprison, or restrain of his liberty, or cause to be recommitted, imprisoned, or restrained of his liberty, for the same cause, any

person so discharged, except as provided in the last section (*sec.* 59), or shall knowingly aid or assist therein, he shall forfeit to the party aggrieved, one thousand two hundred and fifty dollars, and shall also be deemed guilty of a misdemeanor. 2 *R. S.* 571, *sec.* 60; 3 *Hill*, 675, *note, pl.* 50.

Every person convicted of any offense under the above section, shall be punished by fine or imprisonment, or both, in the discretion of the court in which he shall be convicted; but such fine shall not exceed one thousand dollars, nor such imprisonment six months. 2 *R. S.* 572, *sec.* 64.

Penalty for Concealing Prisoner.] Any one having in his custody or under his power, any person, who, by the provisions of the statute, would be entitled to a writ of habeas corpus or certiorari to inquire into the cause of his detention, who shall, with intent to elude the service of any such writ, or to avoid the effect thereof, transfer any such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall be deemed guilty of a misdemeanor. 2 *R. S.* 571, *sec.* 61. And any one having in his custody or under his power, any person for whose relief a writ of habeas corpus or certiorari shall have been duly issued pursuant to the provisions herein, who, with intent to elude the service of such writ, or to avoid the effect thereof, shall transfer such prisoner to the custody, or place him under the power or control of another, or conceal him, or change the place of his confinement, shall also be deemed guilty of a misdemeanor. *Ib. sec.* 62.

Every person who shall knowingly aid or assist in the violation of either of the last two preceding sections, shall be deemed guilty of a misdemeanor, *Ib. sec.* 63; and on conviction thereof shall be punished by fine, or imprisonment, or both, in the discretion of the court in which the conviction is had—but the fine shall not exceed one thousand dollars, nor the imprisonment six months. *Ib. sec.* 64.

Penalty for Refusing Copy of Process.] Any officer or

other person refusing to deliver a copy of any order, warrant, process or other authority, by which he shall detain any person, to any one who shall demand such copy, and tender the fees thereof, shall forfeit two hundred dollars to the person so detained. 2 *R. S.* 573, *sec.* 72.

Proceedings in case of Sickness of the Prisoner.] Whenever, from the sickness or infirmity of the person directed to be produced by any writ of habeas corpus, such person cannot, without danger, be brought before the court or officer before whom the writ is made returnable, the party in whose custody he is, may state that fact in his return to the writ, verifying the same by his oath; and if such court or officer be satisfied of the truth of such allegation, and the return be otherwise sufficient, they shall proceed to decide upon such return, and to dispose of the matter, in the same manner as if a writ of certiorari had been issued, instead of such writ of habeas corpus. 2 *R. S.* 569, *sec.* 49.

When the Writ must be the Writ of Certiorari.] It is provided by the statute, that whenever an application shall be made for a writ of habeas corpus, according to the provisions of the statute, to any officer or court, if it appear to such court or officer, upon the facts set forth in the petition, that the cause, matter or offense, for which the person is confined or detained, is not bailable, according to the provisions of law, instead of awarding such writ of habeas corpus, a writ of certiorari may be granted, directed to the officer or person in whose custody, or under whose control, such prisoner shall be alleged to be, in like manner as if such writ of certiorari had been applied for by the prisoner. *Ib. sec.* 50.

Proceedings on the Return thereof.] Upon the return to such certiorari being made, the court or officer before whom such writ shall be returnable, shall proceed in the same manner as upon returns to writs of habeas corpus (*ante*), and shall hear the proofs of the parties in support of, and against, such return. *Ib. sec.* 51.

If it appear that the person detained is illegally imprisoned, confined or restrained of his liberty, the court or officer shall grant a writ of discharge, commanding those having such person in their custody, to discharge him forthwith; and if it appear that such person is legally detained, imprisoned or confined, and is not entitled to be bailed, such court or officer shall cease from all further proceedings thereon. *Ib.* 570, *sec.* 52. For form of writ of discharge, see *Appendix*, No. 84.

Bail on Return to Certiorari.] If, upon the return to any writ of certiorari, it shall appear that the person detained is entitled to bail (*ante, p.* 130), the court or officer before whom the same was returnable, shall, by order certified by the clerk of the court, or by the officer granting the same, direct the sum in which such person shall be held to bail, and the court at which he shall be required to appear, and that on such bail being entered into, in conformity to such order and the provisions of law, such prisoner be discharged. 2 *R. S.* 570, *sec.* 54. For form of order, see *Appendix*, No. 88.

Upon the production of such order to any judge of the county courts of any county, he shall be authorized to take the recognizance of the person so detained, and of two sufficient sureties, in the sum so directed—with a condition for the appearance of such person at the court designated in such order. But previous to taking such recognizance, such judge shall be satisfied, by the oath of the persons offering themselves as sureties, that they are house-holders in the county, and are severally worth double the sum in which they shall be required to be bound, over and above all demands against them. *Ib. sec.* 55. For form of recognizance, see *Appendix*, No. 89.

Such judge shall file the recognizance taken by him, with the clerk of the court before which the prisoner shall be bound to appear, and shall certify on such order the compliance therewith. The production of such order, so certified, shall entitle such prisoner to be discharged from imprisonment for

the cause which shall have been returned to such certiorari. *Ib. sec.* 56.

How order for Discharge of Prisoner Enforced.] Obedience to any writ of discharge, or to any order for the discharge of any prisoner, granted pursuant to the provisions herein, may be enforced by the court or officer issuing such writ or granting such order, by attachment, in the same manner as herein provided for a neglect to make a return to a writ of habeas corpus, and with the like effect, in all respects (*see ante, p.* 112); and the person guilty of such disobedience, shall forfeit to the party aggrieved one thousand two hundred and fifty dollars, in addition to any special damages such party may have sustained. 2 *R. S.* 570, *sec.* 57.

Officer to be Protected for obeying Order of Discharge.] No sheriff or other officer shall be liable to any civil action for obeying any such writ or order of discharge; and if any action shall be brought against such officer, for suffering any person committed to custody to go at large, pursuant to any such writ or order, he may plead, or with his plea of the general issue may give notice of the same, in bar of such action. *Ib. sec.* 58.

And the officer will be protected, in such case, notwithstanding that the writ of discharge was erroneously granted. 3 *Barb. S. C. R.* 37; *and see* 10 *Paige*, 612.

Writ of Habeas Corpus may Issue after Certiorari.] Notwithstanding any writ of certiorari may have been issued or returned, according to the provisions of law, the court or officer before whom the same was returnable, may issue a writ of habeas corpus, which shall in all respects, be subject to the provisions herein; and if such court or officer refuse a writ of certiorari, or upon the return thereof, refuse to discharge the person detained, if such person claim the writ of habeas corpus, he shall be entitled to the same as hereinbefore provided. 2 *R. S.* 570, *sec.* 53.

Proceedings Removed into the Supreme Court.] It is provided by the Revised Statutes that all proceedings commenced under the statute before any officer, may be removed by certiorari into the Supreme Court, to be there examined and corrected. But no such certiorari shall be issued, unless the same be allowed by a justice of the Supreme Court, nor until a final adjudication shall have been made by such officer, upon the claim to be discharged or bailed. *Ib.* 573, *sec.* 69; 16 *Barb.* 362; *and see Hurd on Hab. Corpus*, 355. The allowance may also, it seems, be made by a judge of the Court of Appeals, or by a county judge, or officer elected to perform the duties of a county judge. *Laws of* 1847, *p.* 324, *sec.* 17; 10 *How. Pr. R.* 181. For form of affidavit, certiorari and allowance, see *Appendix*, Nos. 90, 91; and for return to certiorari, see *Appendix*, No. 92.

The certiorari authorized by the above section, is not merely a common-law certiorari, limiting the court in its review to the single question of jurisdiction; but it contemplates a review upon the merits, so far as the legal rights of the parties are involved. That review, however, is confined to matters of law; and where there has been no error in law, the proceedings can not be "corrected," however improperly the tribunal below may have exercised its power. 6 *Barb.* 369, per Harris, J.; 24 *Id.* 521; *and see* 25 *Wend.* 64. And where a county judge, in the exercise of his discretion, refused to deliver an infant child to the custody of its mother, it was held, that the question whether he exercised that discretion wisely or not could not be reviewed upon certiorari. 6 *Barb.* 366, *supra.*

Nor will the court review the evidence given on the hearing below, or any decision concerning its competency; so held, where the objection was, that the relator was sworn and testified before the commissioner in his own behalf. 5 *Hill*, 17.

In a case where the prisoner was detained under a commitment on final judgment, the county judge refused to allow a writ of habeas corpus, on the ground that he had no jurisdiction to issue it. Whether the prisoner was so committed

or detained, was a question which the county judge was required to decide in order to determine whether or not the writ should be allowed; and his determination that the prisoner was not entitled to it, was held to be a proper subject of review upon certiorari. 16 *Barb.* 362.

Where the proceedings are removed into the Supreme Court on behalf of the people, the district attorney is the proper person to procure the certiorari to be issued, and to act as attorney for them in the prosecution of the same. 15 *Barb.* 153.

The certiorari may be brought to a hearing by either party upon the usual notice of argument; and is entitled to preference on the morning of any day during the first week of term. *Sup. Court Rules*, 1858, *No.* 47.

Appeals to the Court of Appeals.] Formerly the remedy to review the decision of the Supreme Court was by writ of error. 2 *R. S.* 573, *sec.* 70; *Hurd on Hab. Corpus*, 562 *to* 570. But the writ of error having been abolished by the Code of Procedure, the remedy is now by appeal. *Code of Pro.* §§ 8, 11, 323, 333, 457, 471; 2 *R. S. 4th ed.* 805, *sec.* 86; 9 *How. Pr. R.* 304; *s. c.* 3 *Duer*, 616; 2 *Sand. S. C. R.* 740; *Laws of* 1847, *p.* 321; *and see ante, p.* 16, *note.*

And after the Supreme Court has made a final determination upon the writ of habeas corpus or certiorari issued for the relief of any prisoner, such prisoner, if his discharge is refused, may prosecute an appeal thereupon to the Court of Appeals. *Id. ibid.*; 2 *R. S.* 573, *sec.* 70; *Laws of* 1847, *p.* 321, 322.

If the prisoner is discharged by the Supreme Court, the attorney general, if the commitment was upon some criminal accusation, and the party aggrieved, if such prisoner was detained in any civil suit, may in like manner prosecute an appeal to the Court of Appeals. *Id. ibid.*

The court will not stay the proceedings upon the appeal; so held by the late Supreme Court, where the defendant was detained as a fugitive from justice from another State, and after his discharge was refused, applied for a writ of error to

the Court for the Correction of Errors, with a stay of proceedings until the hearing thereon. 9 *Wend.* 222.

The Court of Appeals, upon the appeal, has power to make such orders, and to issue all such writs, as may be necessary, for the discharge or re-commitment of such prisoner, according to the judgment which shall be given by such court; and, generally, to carry such judgment into full effect. 2 *R. S.* 573, *sec.* 71; *Laws of* 1847, *p.* 321, *sec.* 8; *Code of Pro.* § 11.

The provisions of the Common Law.] The provisions of the common law, in regard to the writ of habeas corpus, treated of in this article, are abrogated, except so much and such parts thereof as may be necessary to carry into full effect the provisions herein contained; and the authority of courts and officers to award such writ, or to proceed thereon, by the common law, shall be exercised in conformity to the provisions of this article, in all cases therein provided for. 2 *R. S.* 573, *sec.* 73 (*a*).

To what other Cases the Statute applies.] The several provisions contained in this title (herein considered), shall be construed to apply, so far as they may be applicable, and except where otherwise provided, to every writ of habeas corpus authorized to be issued by any statute of this State. 2 *R. S.* 575, *sec.* 86.

Special Provisions applicable to the City of New York.] In the city and county of New York, except by the judges

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(*a*) The Revisers' original note to this section is as follows: "The authority of the courts is derived as well from the common law, as from the statute; but the proceedings in the two cases may be essentially different. See the opinions of the twelve judges in the American edition of Bacon's Abridgment. (*Hab. Corpus, B.* 13, *p.* 438.) Sometimes courts hold that common-law remedies are not abolished by the enactment of statutory provisions. The above section is proposed, with a view to cut off all pretext for resorting to the inadequate common-law remedy, and to insure a compliance with the statute. In such a case, it is conceived, nothing should be left to implication." *Rev. Notes,* 3 *R. S.* 785, 2*d ed.*

of the court of Common Pleas, there shall be no costs or fees charged or received upon any proceedings upon writs of habeas corpus, either by the judge granting them, or by the officer serving them, or the jailor obeying their orders; and the judge before whom the matter shall be heard, shall, if the case be bailable, and the amount of bail shall have been fixed by the committing magistrate, only determine whether the party is lawfully committed, or is legally chargeable with the offense imputed, and shall not adjudicate upon the question of bail. The amount of bail ordered by the committing magistrate, shall, in such cases only, be altered by a court having jurisdiction of the offense for which the prisoner was committed; and any officer violating the provisions of this section, shall be guilty of a misdemeanor, and shall be subject to the pains and penalties for such offense. The judges of the Court of Common Pleas in and for the city of New York, may charge the fees now allowed by law in such cases. *Laws of* 1844, *p.* 475; 2 *R. S.* 807, *4th ed.*

SECTION II.

WRIT OF HABEAS CORPUS TO BRING UP A PRISONER TO TESTIFY. (*a*)

In what Cases.] The statute provides that every court of record shall have power, upon the application of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of habeas corpus, for the purpose of bringing before the said court, any prisoner who may be detained in any jail or prison within this State, for any cause except a sentence for a felony, to be examined as a witness in such suit or proceeding, in behalf of the party making the application. 2 *R. S.* 559, *sec.* 1. (*b*)

This writ may also be issued by any of the officers herein named upon the application of a party to a suit before any justice of the peace, to bring any person confined in the jail of the same county, or the county next adjoining that where

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(*a*) For the common-law authority of the court or judge to issue the writ, and for the practice in such cases, see 1 *Cowen & Hill's Notes to Phil. Ev.* 19, 22, 23.

(*b*) It is also provided, that whenever any convict confined in any county or State prison shall be considered an important witness in behalf of the people of this State, upon any criminal prosecution against any other convict, by the district attorney conducting the same, it shall be the duty of any officer authorized by law, to allow writs of habeas corpus, upon the affidavit of such district attorney, to grant a habeas corpus for the purpose of bringing such prisoner before the proper court to testify upon such prosecution. 2 *R. S.* 774, *sec.* 7; *Laws of* 1847, *p.* 627, *sec.* 150. And whenever it shall appear to the court, in which an indictment is pending and to be tried, against any person for any offense committed by him while imprisoned in any county prison, or any one of the State prisons, on the person of any other individual confined in such jail or State prison, that any other person confined in any county prison, or in any of the State prisons, is an important witness in behalf of the person so indicted, such court is hereby authorized to grant a writ of habeas corpus for the purpose of bringing such prisoner before such court to testify upon the trial of such indictment, in behalf of the party making the application. *Ib. sec.* 155; *and see chap.* 5, *of Laws of* 1846.

such justice may reside, before such justice, to be examined as a witness. 2 *R. S.* 559, *sec.* 4.

And so, the writ may issue to bring up a prisoner to testify in his own behalf; so held, where the prisoner was detained on a *ca. sa.*, and desired to testify in relation to his own application for a discharge pursuant to an act of insolvency. 5 *Cowen*, 176.

But after the court of Oyer and Terminer shall commence its sitting in any county, no prisoner detained in the common jail of such county, upon any criminal charge, shall be removed therefrom by any writ of habeas corpus, unless such writ shall have been issued by such court of Oyer and Terminer, or shall be made returnable before it. 2 *R. S.* 758, *sec.* 27.

Certain Officers may also allow the Writ.] In addition to the power given to a court of record, to issue the writ, the statute authorizes the writ to be issued by any justice of the Supreme Court, or any officer authorized to perform the duties of such justice, upon the like application of a party to any suit or proceeding pending in a court of record, or pending before any officer or body who may be authorized to examine witnesses, in any suit or proceeding. 2 *R. S.* 559, *sec.* 3.

The officers authorized to perform the duties of a justice of the Supreme Court within the meaning of the above section, are the judges of the Superior Court of law, and the judges of the Court of Common Pleas, in the city of New York, the recorders of cities, and judges of the county courts, being of the degree of counselor at law. *See ante p.* 103. The writ may also be issued by the judges of the Superior Court of the city of Buffalo. *Laws of* 1857, *vol.* 1, *pp.* 752, 754. Also by the City Judge of the city of Brooklyn, within the county of Kings. *Laws of* 1849, *p.* 174, *sec.* 26. And by the City Judge of New York, within that city. *Laws of* 1850, *p.* 388; 6 *Abb. Pr. R.* 146.

The Application, and what to contain.] The application

for the writ should be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. Where the writ is required in an action or matter to which the people of this State shall be parties, the application therefor should be made by the attorney general or district attorney having charge of the same. 2 *R. S.* 574, *sec.* 77.

The statute requires the application to be verified by affidavit, and to state,

1. The title and nature of the suit or proceeding, in regard to which the testimony of such prisoner is desired; and,

2. That the testimony of such prisoner is material and necessary to such party, on the trial or hearing of such suit or proceeding, as he is advised by counsel, and verily believes.

But if the application is made by the attorney general, or the district attorney, it shall not be necessary to swear to such advice or counsel. 2 *R. S.* 559, *sec.* 2. For form of affidavit, see *Appendix*, No. 93.

The Writ.] The writ is required to be under the seal of the court by which it is awarded. If awarded by any officer out of court, it should be under the seal of the court before which it is returnable; or if made returnable before some body other than a court of record, or before an officer out of court, it should be under the seal of the Supreme Court. 2 *R. S.* 572, *sec.* 74. It may be made returnable at a day certain, or forthwith, as the case may require. *Ib. sec.* 75. If issued in term, it may be tested on any day in that term, or if in vacation, on any day in the preceding term. *Id.* 197, *sec.* 5; 1 *Burr. Pr.* 453. For form of writ, see *Appendix*, No. 94.

If the court or officer is satisfied with the affidavit on which the application is founded, the writ will issue, with an endorsement of allowance thereon, which may be as follows: "Allowed this———day of———18—." The endorsement, if the writ is awarded by the court, should be signed by the presiding officer of such court; or if awarded by any officer out of court, the endorsement should be signed by such officer. 2 *R. S.* 574, *sec.* 76.

Though the writ do not say, "*to testify*;" yet, if it have words equivalent, this is sufficient. 5 *Cowen*, 176. So, though it do not specify a place of return within the county; as, at the office of the first judge; for this is to be intended. *Ib.* And the alteration of the writ, after it is executed, without the knowledge or privity of the sheriff, will not deprive him of the right to give it in evidence for his justification, though such alteration be made by the deputy who executed it. *Ib.*

Service of Writ, and by whom.] The writ can only be served by an *elector* of some county within the State, 2 *R. S.* 574, *sec.* 78; except where it is sued out on the application of the attorney general or district attorney. *Ib. sec.* 79. It may be served by delivering the same to the person to whom it is directed, or if he cannot be found, it may be served by being left at the jail or other place in which the prisoner may be confined, with any under officer, or other person of proper age, having charge for the time of such prisoner. *Ib. sec.* 80. If the person upon whom the writ ought to be served, conceal himself, or refuse admittance to the party attempting to serve the same, it may be served by affixing the same in some conspicuous place, on the outside, either of his dwelling-house, or of the place where the party is confined. *Ib. sec.* 81.

Fees, and Bond on Service.] The service of the writ is not complete (except where it has been sued out by the attorney general or district attorney), unless the party serving the same shall tender to the person in whose custody the prisoner may be, if such person be a sheriff, coroner, constable or marshal, the fees allowed by law for bringing up such prisoner; nor unless he shall also give bond to such sheriff, coroner, constable or marshal, as the case may be, in a penalty, double the amount of the sum for which such prisoner may be detained, if he be detained for any specific sum of money, and if not, then in the penalty of one thousand dollars, conditioned that such person will pay the charges of carrying back such prisoner, if he shall be remanded, and that such prisoner will not escape by the way, either in going to, or returning

from, the place to which he is to be taken. 2 *R. S.* 574, *secs.* 78 and 79. For form of bond, see *Appendix*, No. 95.

The fees and expenses for bringing up the prisoner, are one dollar and fifty cents, and for traveling, each mile from the jail, twelve and a half cents; (*a*) and for attending any court with such prisoner, one dollar per day, besides actual necessary expenses. 2 *R. S.* 646.

Duty of Officer to whom the Writ is Delivered.] It is the duty of the officer to whom the writ is delivered, or upon whom it shall be served, whether such writ be directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof; and every officer who shall refuse or neglect so to do shall forfeit to the people of this State, where the writ was issued upon the application of the attorney general, or district attorney, and in other cases, to the party upon whose application the same shall have issued, the sum of five hundred dollars. 2 *R. S.* 562, *sec.* 20; *Ib.* 575, *sec.* 82; 5 *Johns.* 357; 5 *Cowen*, 176.

If the writ is returnable at a certain day, such return shall be made, and such prisoner shall be produced, at the time and place specified therein. If it is returnable forthwith, and the place be within twenty miles of the place of service, such return shall be made, and such prisoner shall be produced, within twenty-four hours; and the like time shall be allowed for every additional twenty miles. 2 *R. S.* 575, *sec.* 85.

The prisoner should be taken by the shortest and most convenient route to the court or place where he is to give his evidence; and, it seems, where he is imprisoned on execution, if the sheriff voluntarily suffers him to go at large

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(*a*) In computing mileage in these cases, it was held under the Revised Laws of 1813, in which mileage was allowed "for every mile from the jail," that the mileage shall be computed both for going and returning. 7 *Cowen*, 424. *And see Cowen & Hill's Notes to Phil. Ev.* 19, *note* 25.

out of his custody in the mean time, or if he goes with him out of the way to accommodate the prisoner, or to answer his individual purposes, and not in the exercise of the legitimate purposes of the writ, it is an escape, for which the sheriff is liable. 10 *Paige*, 614. The sheriff is not bound, however, to keep the prisoner always in sight, or with the same strictness as before; and if the prisoner, of his own will, should go about for a short time on his own business, and out of view of the sheriff, it is not an escape. 18 *Johns.* 48; *and see* 7 *Wend.* 132; *Cowen & Hill's Notes to Phil. Ev.* 20.

The sheriff would be protected in obeying the command of the writ, if valid on its face, notwithstanding that it was irregularly or erroneously allowed. 5 *Cowen*, 176; *and see* 3 *Barb. S. C. R.* 37.

After testifying, the Prisoner to be Remanded.] Whenever any person shall be in execution on any civil process, or committed on any criminal charge, and a habeas corpus shall be issued to bring the body of such prisoner before any court to testify, or to answer for any contempt, or any other matter, and it be returned upon the writ that the prisoner is charged in execution, or committed as aforesaid, he shall be remanded, after having testified; and if any order or commitment be made against such prisoner, he shall be so committed to the prison from which he was taken. 2 *R. S.* 560, *sec.* 5; 2 *Paige*, 104; 10 *Id.* 614.

CHAPTER VI.

PROCEEDINGS IN RESPECT TO IDIOTS, LUNATICS, AND HABITUAL DRUNKARDS.

Section I. Appointment of committee and proceedings thereupon.
II. Proceedings for the sale of their real estate.
III. Miscellaneous matters.

SECTION I.

APPOINTMENT OF COMMITTEE, AND PROCEEDINGS THEREUPON.

By the Revised Statutes the care and custody, of idiots, lunatics, persons of unsound mind, and persons who are incapable of conducting their own affairs in consequence of habitual drunkenness,—and of their real and personal estates, were vested in the chancellor. And he was required, to provide for their safe keeping and maintenance, and for the maintenance of their families, and the education of their children, out of their personal estates, and the rents and profits of their real estates respectively; and to see that their estates were not wasted or destroyed. 2 *R. S.* 52, *sec.* 1. The vice-chancellors, also, in their respective circuits had concurrent jurisdiction with the chancellor in these proceedings, subject to his appellate jurisdiction. *Ib.* 168. But now, the powers of the chancellor are vested by the constitution of 1846, and the judiciary act, in the Supreme Court. And the county courts of the respective counties also have concurrent

jurisdiction with the Supreme Court, in respect to the care and custody of the person and estate of a lunatic, or person of unsound mind, or an habitual drunkard, residing within their respective counties; and also in respect to the sale, mortgage, or other disposition of the real property of such person, situated within the county. *Code of Pro.* § 30. The same authority is also given to the Court of Common Pleas of the city and county of New York, where the lunatic, &c., resides in that city, or the property is situated therein. *Laws of* 1854, *p.* 464, *sec.* 6; 1 *Abb. Pr. R.* 114, 115. And the like authority is also given to the Superior Court of the city of Buffalo, where the lunatic resides in that city, or the property is situated therein. *Laws of* 1854, *p.* 224, *secs.* 9 *and* 11.

In respect to the Superior Court of the city of New York, although jurisdiction in these proceedings was conferred upon it, in part, by sec. 21, of chapter 470, of the Laws of 1847 (*p.* 641), and which has not in terms been repealed, yet, it seems, the question of jurisdiction is so doubtful that that court will not entertain jurisdiction to issue a commission in lunacy. 1 *Abb. Pr. R.* 108, 115. (*a*)

The Jurisdiction and Authority of the Courts.] In addition to the general power and authority of the courts, already stated, the Supreme Court may appoint a committee for a non-resident lunatic, to enable the committee to obtain the control of property in this State. And the court may issue a commission to inquire as to the lunacy of such person; but it cannot be executed beyond the limits of the State. In such case, the court will direct it to be executed in such county as will be most convenient. 2 *Paige*, 174; 9 *Id.* 416; 2 *Barb. Ch. R.* 305; 2 *Johns. Ch. R.* 124. And where a lunatic, after becoming deranged, left his place of residence in this State, leaving personal property here, and went to some place unknown; it was held that for the purpose of an

(*a*) See this case, where the nature and extent of the power to take the persons and property of lunatics and habitual drunkards into custody, and the statutory provisions on the subject, are considered and reviewed by Hoffman, J.

application to the Court of Chancery (now the Supreme Court), for a commission of lunacy, the lunatic must still be considered as a citizen of this State, where he was domiciled at the time he was deprived of his reason. *Ib.*

Proceedings by Overseers of the Poor against Habitual Drunkards.] In respect to habitual drunkards, jurisdiction over their persons and estates was first given to the Court of Chancery, by the laws of 1821 (*chap.* 109, *p.* 99); and in the revision of the laws of 1830 that statute was retained, with some modifications. The statute directs the overseers of the poor of any city or town, who shall discover any person resident therein to be an habitual drunkard, having property to the amount of two hundred and fifty dollars, which may be endangered by means of such drunkenness, to make application to the Supreme Court for the exercise of its powers and jurisdiction. 2 *R. S.* 52, *sec.* 2. And the overseers of the poor may also make such application to the court of common pleas (now the county court), of the county where the drunkard resides, whatever amount of property the drunkard may have. And that court, upon the application by the overseers, is vested with the same powers in relation to the person and property of the drunkard, as are conferred on the Supreme Court, and is in all respects to proceed in the like manner, subject to an appeal to the Supreme Court. *Ib. sec.* 3; *Code of Pro.* § 30; and see *Laws of* 1854, *p.* 464; *Will. Eq. Jur.* 683.

The Revised Statutes further provide in reference to the jurisdiction of that court in cases of habitual drunkards, that the application by the overseers of the poor for a commission, may be made in vacation to the first judge of the county; who is authorized to award the same to one or more proper persons, to inquire into the fact of such alleged habitual drunkenness; and the inquisition taken thereon shall be returned to the next term of the court, who shall confirm or set the same aside. *Id. ibid.*; 2 *R. S.* 52, *sec.* 4.

If the party proceeded against traverses the inquisition on its return, an issue shall be directed by the court, as in other

cases, which shall be tried in the same court; and the verdict thereon shall have the same effect as if rendered upon an issue awarded by the Supreme Court. *Ib.* 53, *sec.* 5.

Appeals from any order, judgment, or decree of any county court, made pursuant to the above provisions, shall be filed and entered within three months after the making of such order, judgment, or decree; and shall be accompanied by a bond, with such sureties as the court shall approve, to the opposite party, in the penalty of one hundred dollars, conditioned for the payment of such costs as shall be awarded against the appellant, in case of the order, judgment, or decree being affirmed. *Ib. sec.* 6; and see *Code of Pro.* § 30; *Laws of* 1854, *p.* 464.

The expenses of the overseers of the poor, in conducting the proceedings, are required to be audited and allowed in the same manner as other expenses of the city or town. 2 *R. S.* 53, *sec.* 7.

Who are Idiots, Lunatics, &c.] An idiot is a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. A person is not an idiot if he has any glimmering of reason, so that he can tell his parents, his age, or the like common matters. And so, it is said that a person who has understanding enough to measure a yard of cloth, number twenty correctly, tell the days of the week, &c, is not an idiot in the eye of the law. But a man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot; and he is supposed incapable of any understanding, and as wanting in all those senses which furnish the human mind with ideas. 1 *Bl. Com.* 316, 317; and see *Will. Eq. Jur.* 673.

A lunatic, or non compos mentis, is one who has had understanding, which he has lost by disease, grief, or other accident. And under the general name of non compos mentis, which is the most legal term for all defects of the mind which the law notices, are comprised not only lunatics, but persons under frenzies; or who lose their intellect by disease; and

those who are deaf, dumb, and blind not being born so. 1 *Bl. Com.* 317; 26 *Wend.* 299; *Will. Eq. Jur.* 673.

But a person born deaf and dumb is not necessarily an idiot, or non compos mentis; though such, perhaps, may be the legal presumption until his mental capacity is proved, on an inquiry and examination for that purpose. 4 *Johns. Ch. R.* 441.

Persons of unsound mind, consist of lunatics; those under frenzy or temporary derangement, from disease or other cause; those who become deaf, dumb, and blind; and such as the court adjudges incapable of managing their own affairs, by reason of old age, sickness, or other cause. 1 *Bl. Com.* 317; 26 *Wend.* 299; 2 *Johns. Ch. R.* 233; 1 *Coll. on Lun.* 4.

It is not every case, however, of mental weakness or imbecility or unsoundness, which will authorize the court to exercise the power of appointing a committee over the person and estate; though it is generally sufficient to justify the interference of the court, that the party is mentally incapable of governing himself, or of managing his affairs. 1 *Barb. S. C. R.* 437; and see 7 *Paige*, 236; 3 *Ed. Ch. R.* 380; 2 *Johns. Ch. R.* 233; *Will. Eq. Jur.* 673 *to* 677; 26 *Wend.* 302, 309.

In respect to an habitual drunkard, and as to who is to be considered such, within the statute, it was observed by Walworth, Ch. (*In the matter of Tracy*, 1 *Paige*, 582), that "a very erroneous impression appears to have gone abroad on this subject. It is supposed by many that the prosecutor in in such cases is bound to prove affirmatively that an habitual drunkard is incapable of managing his affairs. On the contrary, the fact that a person is for any considerable part of his time intoxicated to such a degree as to deprive him of his ordinary reasoning faculties, is prima-facie evidence at least, that he is incapacitated to have the control and management of his property."

Who may apply for a Commission.] The application for a commission is usually made by the near relatives of the lunatic, &c. Thus, it may be made by a husband against his

wife, or by a father or mother, against a child, and *vice versa;* or by brothers, sisters, uncles, aunts, nephews, nieces and cousins, against each other. And so, also, an executor under a will, may apply for a commission against a legatee under the same will; and a trustee under a deed, against his *cestui que trust;* and creditors against their debtor. And a commission may also issue upon the petition of the tenant of the party. *Shelf. on Lun.* 93; 1 *Coll.* 126.

And so, the commission may be applied for even by strangers; and that, too, in opposition to the members of the family—where the lunacy seems indisputable. 1 *Russ.* 348; 1 *Moll.* 439. The carriage of the commission however, will be given to relations, in preference to strangers, if there is no valid objection to it. 1 *Ves. & Bea.* 57.

In respect to an habitual drunkard having property in this State, which may be endangered by reason of his drunkenness, the statute makes it the duty of the overseers of the poor of the town or city in which the drunkard resides, to make an application for the commission. 2 *R. S.* 52, *secs.* 2, 3. But the application may also be made by the friends of the drunkard, notwithstanding this provision of the statute. *See* 5 *Paige*, 122.

Where the petition is presented by the wife of the supposed lunatic, it must be in the name of her next friend; who will be answerable for the costs of the application, in case the court shall think proper to impose them upon the petitioner. 2 *Barb. Ch. Pr.* 228.

Application for a Commission.] The first step to be taken towards the appointment of a committee of a lunatic, or idiot, or habitual drunkard, is to apply for a commission in the nature of a writ *de lunatico inquirendo.* And the court has no jurisdiction to appoint a committee, or to order a sale of the lunatic's property, before such commission has been issued and returned. 8 *How. Pr. R.* 220; but see the remarks of Harris, J., in 1 *Barb. S. C. R.* 441, *post, p.* 162.

The application is founded upon petition, which should be

accompanied by affidavits setting forth the unsound state of the mind of the party, and stating such facts in respect to his conduct or language as may show that he is a proper subject for the protection of the court. And in England, as well as in this country, the courts have been scrupulous about granting a commission, without strong preliminary proof, amounting at least to a probability of insanity. In *Ex Parte Persse* (1 *Moll.* 219), the Lord Chancellor remarked that "the mere issuing of a commission may produce consequences highly detrimental, and it is not to issue without great circumspection;" and he interposed to give directions personally to physicians to visit the supposed lunatic, and afterwards consulted with them apart. And Mr. Shelford remarks (*Shelf. on Lun. p.* 82), that where the lunacy is not apparent, the affidavits of two physicians will be required, swearing to their opinion of the lunacy, and their reasons for that opinion, before granting a commission. And such has, in general, been the practice of our courts. See per C. L. Allen, J., 8 *How. Pr. R.* 223. For forms of petition and affidavits, see *Appendix*, Nos. 96 to 100.

Where the lunatic is a non-resident of the State, the petitioner must also show that he is the owner of property situated in this State; and it is not sufficient to state that fact in the affidavits annexed to the petition. 2 *Barb. Ch. R.* 305.

The application is ex parte, and should be made to the court at special term; *see* 17 *Barb.* 348; though in respect to the county court, the application may be made at any term, or even out of term, that court being always open for such business. *Code of Pro.* § 31. If the petition and accompanying affidavits make out a prima-facie case of lunacy, idiocy, drunkenness, &c., the court will, in general, grant the order; though it is not bound to do so. 1 *Ves. & Bea.* 58; 19 *Ves.* 286. For form of order, see *Appendix*, No. 101.

The Commission.] Upon the order for a commission being granted, and entered with the clerk of the court, the commission will issue. It is usually prepared by the attor-

ney for the petitioner, and is then endorsed and sealed by the clerk.

The commission is generally directed to three persons, to be appointed by the court; though the court may appoint a larger or smaller number, in its discretion. One of the commissioners should be an attorney of the court; and in cases of idiocy or lunacy, it is usual to name one or more respectable physicians as commissioners.

The commission should direct an inquiry as to the value of the real and personal estate of the lunatic, &c.; the annual value of the rents and profits of such real estate; and also as to who are the next of kin of the lunatic, &c. For form, see *Appendix*, No. 102.

Effect of Issuing Commission.] After a commission has been issued, persons purchasing property or otherwise dealing with the alleged lunatic, with a knowledge that the same has been issued, will do so at the risk of having their whole proceedings declared illegal and void. And accordingly, where a person purchased real estate and took a conveyance thereof, with full knowledge that a commission had been issued against the grantor as an habitual drunkard, to inquire as to his incapacity to manage his affairs, and that the sheriff was then proceeding to summon a jury to try the inquisition, the court, in an action commenced by the committee of the habitual drunkard, set aside the conveyance, with costs. 15 *Barb.* 520.

Authority of the Court pending the Proceedings.] Although the court cannot permanently assume the custody and control of the person and estate of the alleged lunatic, without the verdict of a jury, yet after a commission has been allowed, the court may temporarily interfere, for the purpose of protecting and taking care of the alleged lunatic until the jury have passed upon the case. 2 *Wils. & Shaw*, 515.

And the court may interfere to restrain the removal of the supposed lunatic out of the country, even before a commission is issued. *See Shelf. on Lun.* 100. But it will not

make an order for that purpose except upon affidavits showing satisfactorily that the party is a fit subject for a commission of lunacy, and that there is cause for reasonable apprehension of his removal. *Ib.*

The court may also permit access to be had to a person supposed to be a lunatic, for the purpose of enabling him and his friends to oppose the commission. Thus, in a case where a commission had been issued against a person who was imprisoned, and access to him had been denied; on the petition of his daughter and her husband, stating that they believed they could produce competent witnesses to prove that the party was of sound mind, and able to manage his own affairs, and that they disapproved of the issuing of the commission, the court ordered that the petitioners, and their solicitors and such medical advisers as they might think fit to appoint, should have access to and be at liberty to visit the supposed lunatic, at all reasonable times prior to and during the execution of the commission, for the purpose of ascertaining the actual state of his mind and his competency to manage his affairs. *Ib.* 98.

Notice of the Execution of the Commission.] The party proceeded against as a lunatic, &c., is entitled to reasonable notice of the time and place of executing the commission, and a reasonable time to produce his witnesses before the jury, 1 *Barb. Ch. R.* 38; and he is entitled to such notice, although he resides out of the State. 2 *Paige*, 174. For form, see *Appendix*, No. 104.

But it is not necessary that a lunatic should be served personally with notice where it is evident he keeps out of the way to avoid such service. 1 *Barb. Ch. R.* 38, *supra*. And in cases of confirmed and dangerous madness, no notice whatever is necessary. *Ib.* Nor is notice necessary where there are peculiar circumstances, rendering it improper or unsafe to give such notice; though in such case they should be stated in the petition to the court so that a special provision may be inserted in the commission dispensing with notice. 1 *Paige*, 580.

Place of Executing the Commission.] The order for the commission usually directs the commission to be executed in or near the place of residence of the supposed lunatic, and a jury of the county and of the neighborhood where he resides, to be returned, to inquire of the lunacy, &c. 2 *Barb. Ch. Pr.* 230. But where the alleged lunatic is not a resident of the State, the usual order directing the commission to be executed at or near the residence of the lunatic must be dispensed with; and in such case, it may be executed in such county as will be most convenient, and nearest to the lunatic's residence. 2 *Paige*, 174.

And though the general rule is, where the party resides within the jurisdiction of the court, not to direct the commission to be executed at any other place than his residence, yet there are exceptions to the rule; and it may be departed from where satisfactory reasons are shown to warrant it. Thus, where the supposed lunatic had a town and country residence, both in the county of Middlesex, the commission was directed to be executed at or near either of such places of abode, as the commissioners should direct. *Matter of Jervis, cited in Shelf. on Lun.* 96. In another case, the court took into consideration the convenience and attendance of witnesses upon the inquiry, and directed the supposed lunatic to be conveyed from London, where he had been some time, to the place of his former residence, where the commission was directed to be executed. *Matter of Green, Id. ibid.*

Witnesses.] The commissioners may issue subpœnas for witnesses, as incidental to their office; and if the witnesses refuse or neglect to attend, the court will make an order to compel them to do so. 1 *Coll.* 138; *Shelf.* 103. For form of subpœna, see *Appendix*, No. 107.

Precept for a Jury.] The commissioners are also authorized to issue a precept to the sheriff of the county in which the commission is to be executed, commanding him to cause a jury of good and lawful men of his county, to come before them at a certain time, and in a certain place, to inquire upon

their oaths of the matters and things which shall be given them in charge by virtue of the commission. *Shelf. on Lun.* 95. For form, see *Appendix*, No. 103. The commissioners have no right to dictate to the sheriff what jurors should be summoned. And where they selected and made out a list of jurors, whom they directed the sheriff to summon, it was held to be irregular, and the proceedings were set aside. 6 *Paige*, 11.

The jurors who are sworn upon the inquest, are each entitled to twelve and a half cents. 2 *R. S.* 644, *sec.* 37.

Duty of Sheriff.] Upon receiving the warrant or precept of the commissioners, it will be the duty of the sheriff to select and summon the jurors. The commissioners have no right to interfere with the sheriff in the exercise of that duty. 6 *Paige*, 11.

The sheriff will summon not less than twelve, nor more than twenty-four jurors, whose names he will write in a panel annexed to the precept; and to which panel he will refer in making his return. No inquest can be taken upon the oaths of less than twelve jurors.

It is the duty of the sheriff, also, to attend on the execution of the commission, if desired to do so by the commissioners, for the purpose of guarding the passage to the room where the jury are deliberating, and preventing them from being intruded upon by others. 1 *Paige*, 498. But it is improper for the sheriff to be in the room with the jury, or to converse with them on the subject of their deliberations. *Ib.* And in a case where the sheriff improperly interfered with the deliberations of the jury in this respect, the inquisition was, for that reason, set aside, and a new commission issued, in which it was ordered that the warrant of the commissioners to summon the jury be directed to the coroners. *Ib.*

The sheriff is entitled for summoning the jury, one dollar; and for attending such jury, when required, fifty cents. 2 *R. S.* 646.

Proceedings before the Commissioners.] The party pro-

ceeded against is entitled to be present at the execution of the commission; and he may have counsel, also, to assist him. The friends of the party may also attend before the commissioners in his behalf; thus, where the wife of the supposed lunatic opposed the issuing of the commission, the court made an order that she should be at liberty to attend the execution of the commission, by counsel, if she thought proper. *See Shelf. on Lun.* 99. And the court, also, will see that ample means for resisting the commission, are furnished to those who act on the inquiry, in behalf of the lunatic. 4 *Russ.* 182.

Before entering upon the examination, the commissioners should require due proof of the service of notice of the proceedings upon the lunatic, or party proceeded against. For affidavit of service, see *Appendix*, No. 105.

In conducting the proceedings before the jury of inquiry, one of the commissioners (usually the one first named in the commission), must administer an oath to the jurors, and must also swear the witnesses, previous to their being examined. For forms, see *Appendix*, Nos. 108, 109. He must also read to the jury the commission, and explain the object of their meeting and their duties. The witnesses are then to be examined both as to the fact of lunacy, &c., of the party proceeded against, and as to who are his next of kin, and the nature, extent, and value of his real and personal estate.

And to aid the jury in their inquiries, upon the execution of the commission, they have the right to inspect and examine the lunatic; and they should do so in every case of doubt where such examination can be had. 1 *Barb. Ch. R.* 38. In such cases, the commissioners should direct the person in whose custody the lunatic is, to produce him, or to permit him to attend before them. *Ib.* For form of order or notice, see *Appendix*, No. 106. In case of the refusal of such person to do so, the court will commit him for a contempt. *Ib.;* and see 1 *Coll. on Lun.* 144; 1 *P. Wms.* 702; *Shelf. on Lun.* 99.

After the testimony, &c., is closed, the commissioners should submit the question to the jury in the form of a charge, stating the law applicable to the case, and recapitulating the

facts, if necessary, but without arguments of counsel on either side. And the jury are to be instructed if twelve or more of them find that the party is not incompetent, they are to deliver their verdict accordingly; or if the same number decide against his competency, that they then find and determine the other facts directed to be inquired of; and that if twelve of them cannot agree either way, they report the fact to the commissioners, that their return may be made accordingly. 1 *Paige*, 499.

In relation to legal questions which arise in the execution of the commission, a majority of the commissioners must decide. *Ib.*

And the commissioners may also determine upon the validity of challenges to jurors. 6 *Paige*, 11.

Inquisition.] The jury having deliberated upon the matter of inquiry, and agreed upon a verdict, are to return the same to the commissioners. The blanks in the inquisition (which is a response to the commission, in relation to the fact of lunacy, drunkenness, &c.), are then filled up, and the inquisition is signed and sealed by the commissioners, and by the jury. See 1 *Grant*, 296; 1 *Coll.* 140; 2 *Barb. Ch. Pr.* 233. The inquisition is then delivered to the commissioners, and is annexed by them to the commission. For form, see *Appendix*, No. 110.

With respect to the *form* of the inquisition, the jury should adhere substantially to the technical form of finding in the language of the statute itself; as, that the party is an "idiot," or "lunatic," or of "unsound mind and incapable of the government of himself or the management of his estate;" or that the party is "incapable of conducting his own affairs in consequence of habitual drunkenness." See 1 *Barb. S. C. R.* 437; 3 *Edw. Ch. R.* 380; 7 *Paige*, 236; *Shelf. on Lun.* 108, 109; *Will. Eq. Jur.* 675 *to* 680. It seems, however, it is sufficient to give the court jurisdiction, if the jury find that the party is mentally incapable of governing himself, or managing his affairs. 1 *Barb. S. C. R.* 437. "The form of

the return to the inquisition," says Harris, J., in the case last cited (p. 441), "is only important so far as it is necessary to satisfy the conscience of the court. If, upon the coming in of the inquisition, enough appears to enable the court to adjudge the party to be within some one of the classes of persons over whom the statute has given it jurisdiction, it is sufficient. A discreet exercise of the power vested in the court undoubtedly requires that before a citizen shall be deprived of his liberty, and the control of his own property, evidence of the most conclusive character should be produced, showing him to be a person for whose benefit the law has benignly provided this delicate and important trust. But I am not prepared to say that a case might not be presented to the court in which the evidence would be so clear and satisfactory as to justify the exercise of its summary power, for the protection of a party, without the intervention of a jury. Whether this be so or not, I cannot doubt that under the law of this State, it is enough to vest the court with jurisdiction of the case, when, as in the case under consideration, the jury find that the party is mentally incapable of governing himself, or managing his affairs." See also, *Will. Eq. Jur.* 675 to 680, where the English and American authorities are stated at large.

Where the return is, that the party is a "lunatic," it is usual, also, to state whether with or without lucid intervals; though where it omits to do so, it is not therefore bad; as the return, in that case, negatives their existence by implication. 3 *Atk.* 168; 5 *Ves.* 450.

In cases where the party is found a lunatic, it is also usual to state for how long a time he has been so. For the principle on which the court extends its protection to lunatics requires an examination into the circumstances of competence or incompetence, under which the lunatic has performed acts affecting his property. It is usual, therefore, in all such cases when it appears that the lunacy has been of some duration, to inquire from what period it commenced. *Shelf. on Lun.* 97; and see *Stock's Law of Non. Comp.* 101. And inquisi-

tions have sometimes been quashed, on the ground that the commencement of the lunacy was not carried back as far as was warranted by the evidence. *Id. ibid.*

In the case of an idiot, the return is sufficient if it finds the party to be so, without the addition of any other words. 3 *Mod.* 43; 2 *Ves. sen.* 408.

The inquisition should also find who are the next of kin of the party proceeded against, the value of his real and personal estate, and generally all the particulars directed to be inquired of in the commission. For form, see *Appendix*, No. 110.

Return of Commission.] After the inquisition has been duly signed and sealed by the commissioners and the jury, the commissioners should annex it to the commission, and having endorsed upon the commission their return in these words: "The execution of this commission appears in the schedule hereunto annexed" (1 *Grant*, 296; 1 *Coll. on Lun.* 140), they should file the commission and the inquisition annexed, with the clerk of the court.

Fees of Commissioners.] On the execution of the commission, the commissioners are each entitled to two dollars for every day they are necessarily employed in hearing the testimony, and taking the inquisition. *Sup. Court Rules*, 1858, *No.* 85; 2 *R. S.* 643, *sec.* 35. And for drawing the inquisition and process, and serving notices, when no attorney is employed, they are entitled to the fees to which an attorney would be entitled for the same services. *Rule* 85, *supra.* The fees of an attorney are the same as those allowed to solicitors in the late Court of Chancery; and are regulated by the fee bill in existence prior to the code. *Code of Pro.* § 471; *and see* 16 *Barb.* 592.

New Commission may Issue.] In case of the death or incapacity of the commissioners, the commission will be suspended, and a new one directed to be issued. *Shelf. on Lun.* 83.

The court may also direct the issuing of a new commission

where from the evidence before the jury, or otherwise, there is no doubt that the jury erred in finding that the party proceeded against, was not of unsound mind. 2 *Barb. Ch. R.* 97; and see *post*, Title, "Setting aside Inquisition; new commission, &c."

Proceedings upon the Return.] Upon the filing of the return of the commissioners, &c., a motion should be made to the court to confirm the finding of the jury; which motion is founded upon the commission, inquisition, and return.

Notice of the motion should be given to the party proceeded against, where he appeared either in person or by counsel, and contested the proceedings before the jury. For form, see *Appendix*, No. 111.

The motion to confirm the finding of the jury, is also usually accompanied by an application for the appointment of a committee of the person and estate. This application is founded upon petition and notice, copies of which, where the finding has been contested, should be served upon the party or his attorney. See *post.* For forms, see *Appendix*, Nos. 111, 112.

The alleged lunatic, &c., may also apply at the same time for an order to set aside the inquisition, or for leave to traverse it, or for an issue, and the court will hear the several motions together, when convenient. 5 *Paige*, 242; *and see post, p.* 167.

Who may be appointed Committee.] It is usual, if the lunatic has a son of proper age, and no particular objection exists, to appoint him the committee of the estate. 1 *Moll.* 439. But it is not a matter of course to commit the guardianship of the estate to those who are presumptively entitled to it upon his death, as his heirs or next of kin. They will, however, be appointed the committee where it satisfactorily appears to the court that they are the persons who are the most likely to protect his property from loss. 9 *Paige*, 611.

Other things being equal, persons whose place of residence admits of their frequently visiting the lunatic, and inspect-

ing the management of his concerns, are to be preferred as committees. *See Ex. parte Fenner*, *Jac.* 404.

In the appointment of the committee of the person of a lunatic, the court will attend as far as possible to the wishes and inclinations of the lunatic. *Loyd & Goold* (*Temp. Plunk.*), 498. In general, the custody of a lunatic wife will be committed to the husband, and of a lunatic husband to the wife; though otherwise where strong reasons exist against it. In the case of a lunatic husband, the court seems disposed to unite some other person as committee with the wife. 1 *P. Wms.* 701; 18 *Ves.* 22. The custody of an unmarried woman will be given to one of her own sex, in preference to the other. And in the case of a lunatic mother, Chancellor Kent committed the guardianship of the person to the daughter; and observed that the presumption, if one must be indulged, would be in favor of kinder treatment and more patient fortitude from her, than from the collateral kindred. 1 *Johns. Ch. R.* 436.

In general, but one person should be appointed committee of the person. 2 *P. Wms.* 635.

Appointment of Committee.] If the party proceeded against has been found a lunatic upon the execution of the commission, an application should then be made to the court for the appointment of a committee of the person and estate. The court may appoint the same person committee of the person and of the estate; though it is usual, where the estate is large, to have a separate committee for each. But the court have no jurisdiction to appoint such committee, without the issuing and return of a commission. 8 *How. Pr. R.* 220; but see, per Harris, J., 1 *Barb. S. C. R.* 441, *ante p.* 162. The motion, as we have seen, is founded upon petition and notice, copies of which, when the finding has been contested, should be served upon the party or his attorney.

Where the next of kin, who are adults, join in the petition, and name a proper person as committee, or give their consent, in writing, to the appointment of the person named by the petitioner, the court usually directs an order to be en-

tered appointing such person, without the expense of a reference, upon his giving the usual security to be approved of by a judge of the court.

But where the next of kin have not had notice of the application for the appointment of a committee, nor assented to the appointment of the person named as committee, the court usually orders a reference to inquire and report who is a suitable and proper person to be appointed such committee, and to approve of the sureties, and that the next of kin have notice of the proceedings upon the reference. The court, however, may appoint a committee, in such case, without a reference for that purpose. See 2 *Barb. Ch. Pr.* 236; 1 *Barb. S. C. R.* 441. For form of order, see *Appendix*, No. 113.

Upon the proceedings upon the reference, the heirs or next of kin have the right to propose themselves to the referee, as the committee. 1 *Moll.* 439. And where the order of reference directs notice of the proceedings to be served upon them, notice should be served accordingly; and the heirs may attend upon such reference, though no direction or notice is given.

A state of facts, and proposal of committee and sureties, being presented and delivered to the referee, if he approves of the committee and sureties, and the amount and form of the bond, he reports the same to the court. For form of report, see *Appendix*, No. 114. And upon the coming in of his report, if it is approved by the court, an order is entered for confirming the same, and for the appointment of the committee, upon his executing a bond in the amount and with the sureties reported, conditioned for the faithful execution of his trust, in the usual form, and duly acknowledged or proved according to the rules of the court. For form, see *Appendix*, No. 115.

Bond of Committee, &c.] Before entering upon the trust committed to him, the committee must execute a bond with two sufficient sureties to be approved of by a judge of the court, and conditioned for the faithful performance of the

trust reposed in him as such committee; and that he will render an account whenever required, in conformity to the rules and practice of the court; and that he will observe the orders and directions of the court in relation to such trust. 2 *Barb. Ch. Pr.* 237. For form, see *Appendix*, No. 116.

The court, however, in a proper case, may dispense altogether with security from the committee; as, where the referee reports that no person can be found to act as committee who will give security. 2 *Russ.* 450; *and see* 1 *Con. & Lawson*, 309. But the court will not dispense with security merely because the committee is the eldest son and heir at law of the lunatic. 2 *Russ.* 450, *supra.*

The penalty of the bond is usually fixed by the order of the court appointing the committee, and should be in double the value of the real and personal estate of the lunatic, &c., as found by the inquisition; though it is sufficient, in the first instance, if the penalty is in double the value of the personal estate alone.

The bond should be made payable to the people of the State, or to the clerk of the court. 1 *Barb. Ch. R.* 43.

And after it has been duly executed by the committee and his sureties, and proved or acknowledged, and the sureties have justified, and the judge's certificate of approval has been indorsed upon it, it should be filed with the clerk of the court. *See Sup. Court Rules*, 1858, *No.* 6.

Traverse of Inquisition.] In England, a party who has been adjudged a lunatic, &c., may traverse the inquisition, and proceed to trial thereon, with the like effect, in all respects, as in other cases of traverse. And the traverse, in such case, is considered a matter of right, over which the court has no discretion, except so far as to ascertain that the party in whose name the application is made, wishes to traverse. 1 *Paige*, 582; 1 *Barb. S. C. R.* 436; *Will. Eq. Jur.* 682.

In this State, however, instead of permitting the formal traverse, the practice is to award a feigned issue, in all cases

where a jury trial is proper. The court having the whole jurisdiction, and the object being to inform the conscience of the court, and to arrive at the truth, the directing an issue to be made up and tried, under its direction, has been thought preferable to a traverse. *Id. ibid.;* 1 *Johns. Ch. R.* 599.

It is not, however, a matter of course to award an issue; but the same rests in the sound discretion of the court. 1 *Paige*, 580; 1 *Barb. S. C. R.* 436; 1 *Barb. Ch. R.* 38. But the court will award an issue whenever it entertains a reasonable doubt as to the justice of the finding of the jury upon the execution of the commission; especially under the act respecting habitual drunkards. *Id. ibid.;* 1 *Paige*, 582, *supra.*

The application for an issue may be made by the lunatic himself, by a member of his family, or by a relative, or by a purchaser from him, or by any person having an interest in his land, or a party who has entered into a contract with him, or who supposes his interests to be affected by the acts of the lunatic. 9 *Ves.* 478; 2 *Wils. & Shaw*, 520; 5 *Paige*, 242; 11 *Id.* 243.

But the court will not grant an application for an issue in the name of a lunatic, unless it is satisfied upon a private examination of the lunatic, or by the report of a referee, that such is the wish of the lunatic, and that he is capable of understanding the nature and object of the application. 5 *Paige*, 242. It is otherwise, however, where the conveyance of a purchaser is over-reached by the inquisition. In such case, the court, upon probable cause shown, will award such issue upon the purchaser's stipulating to be bound by the final decision thereon. *Ib.* And where, in such case, an issue was awarded, and subsequently the counsel for the several parties to the proceedings, without the sanction of the court, stipulated to abandon the trial thereof; it was held that they had no right to do so, and the court set aside the stipulation, and directed the committee of the lunatic to proceed to the trial of the issue. 11 *Id.* 243.

If an issue is awarded, the court will, if necessary, make a provisional order for the care of the lunatic's estate, until

the question of lunacy is determined. 1 *Johns. Ch. R.* 599; 3 *Atk.* 634; 1 *Barb. Ch. R.* 42.

In respect to an issue in proceedings commenced by overseers of the poor, against an habitual drunkard, see 2 *R. S.* 53, *sec.* 5, *ante*, *p.* 151.

Proceedings thereon.] The application for an issue to try the question of lunacy, is founded upon petition and notice; and is also generally accompanied by affidavits of persons setting forth their belief, &c., of the sanity of the alleged lunatic. Copies of the papers on which the motion is founded should be duly served upon the committee, if one has been appointed; or, if not, upon the party instituting the proceeding, or his attorney. For forms, see *Appendix*, Nos. 117, 118, 119.

If the application is made in the name of the alleged lunatic, and the petition is sworn to by him, the officer before whom the same is sworn should state in the jurat that he has examined the petitioner for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind, and capable of understanding the nature and contents of the petition. 5 *Paige*, 242. For form of jurat, see *Appendix*, No. 127.

If an issue is granted it is made up and tried in the usual manner. For form of order directing an issue, see *Appendix*, No. 120.

And the court may, in a proper case, direct the issue to be tried in a different county from that in which the subject of the inquiry had been found a lunatic. See 2 *Moll.* 517.

In respect to the form of the verdict of the jury on the trial of the issue, see *ante*, *p.* 161, title "Inquisition."

Effect of Inquisition.] An inquisition, by which a person is found to be a lunatic, or of unsound mind, and incapable of the management of his affairs, is conclusive evidence of the incapacity of such person.

Accordingly, a contract for the sale of real estate, executed by a person who has been found, upon inquisition, to be

a lunatic, and of whose person and estate a committee has been duly appointed, is absolutely void. And the committee cannot, by any act of his, without the authority and direction of the court, make such a contract valid. 12 *Barb.* 235. And so, where an action was brought against the endorser of a bill of exchange, who, after the making and endorsing of the bill, had been found to be an habitual drunkard upon a commission issued for that purpose; it was held, that after the finding of the inquisition, the defendant was not competent to waive notice of non-payment and protest. 14 *Id.* 169, *aff.* 4 *Selden*, 388; 4 *How. Pr. R.* 34.

Nor can one who, by inquisition, has been found to be a lunatic, or an habitual drunkard, make a valid will, 2 *Barb. Ch. R.* 208; 4 *How. Pr. R.* 34; nor can he, even in his lucid or sober intervals, make a contract to bind himself or his property. See 4 *Selden*, 388, *supra.*

But the court has the power to suspend the operation of an inquisition, so far as to allow the subject of it to make a testamentary disposition of his property; without discharging the proceedings entirely, or restoring him to the full control of his property for every purpose. 2 *Barb. Ch. R.* 208; 4 *How. Pr. R.* 34; *and see* 4 *Selden*, 396. And an application for that purpose is addressed to the discretion of the court, and may be made ex parte, or on notice to the committee, and next of kin, as the court may direct. 4 *How. Pr. R.* 34, *supra.*

The inquisition is analogous to a proceeding *in rem*, and is presumed to be known to all who subsequently deal with the lunatic. 4 *Selden*, 388, 392; 15 *Barb.* 523; 6 *Wend.* 498.

With respect to acts done by a lunatic or drunkard before the issuing of a commission, and which are over-reached by the finding of the jury, the inquisition is presumptive, but not conclusive, evidence of their invalidity. 2 *Paige*, 422; 4 *How. Pr. R.* 34; 2 *Barb. Ch. R.* 208.

And a judgment recovered in a court of law against a person who has been found a lunatic, or an habitual drunkard, and whose person and property have been placed in the custody of a committee, will not for that reason be held void,

or even erroneous. 2 *Barb. S. C. R.* 153; 13 *Id.* 424; 14 *Id.* 488. The remedy of the lunatic, or of his committee, in such case, is to apply to the court appointing the committee, to restrain the prosecution of the suit, and to punish the plaintiff for a contempt. If judgment has been obtained, the court will also restrain the farther proceedings to enforce its collection. *Id. ibid;* and see 5 *Paige*, 489; 2 *Id.* 423; 3 *Id.* 199.

Setting aside Inquisition; New Commission, &c.] The inquisition may be set aside by the court for irregularity; or where it does not conform to the requirements of the statute; or where the facts do not justify the finding of the jury.

Thus, the inquisition will be set aside, and a new commission issued, where the alleged lunatic or habitual drunkard did not have notice of the execution of the commission. 1 *Paige*, 581. So, also, where the commissioners interfered with the sheriff, in the execution of his duties, by making out a list of jurors, and directing him to summon them. 6 *Id.* 11. So, where the sheriff, having charge of the jury, improperly enters the room and converses with them on the subject of their deliberations. 1 *Id.* 497.

And where the inquisition does not conform to the requirements of the statute, by failing to find the party an idiot, or a lunatic, or a person of unsound mind, as the case may be, but is argumentative, or in other respects deficient, the court will set it aside and order a new commission to issue. 7 *Id.* 236; 1 *Barb. S. C. R.* 436.

The court may also set aside an inquisition upon the mere examination of the supposed lunatic, in connection with the evidence produced before the jury, where upon such examination and proof it is evident that the jury erred in finding him to be a lunatic. 1 *Barb. Ch. R.* 38. But the court will not dispose of the case thus summarily, where there has been no change in the situation of the alleged lunatic subsequent to the finding of the inquisition, unless there is a very clear case of mistake or undue prejudice on the part of the jury. *Ib.* Nor will the court discharge the inquisition upon ex parte affidavits contradicting the finding of the jury; where

there is no reasonable excuse given for neglecting to produce the deponents as witnesses before the commissioners. *Ib.*

Suspending or Superseding Commission.] The statute provides, that in case any lunatic, person of unsound mind, or habitual drunkard, shall be restored to his right mind, and become capable of conducting his affairs, his real and personal estate shall be restored to him. 2 *R. S.* 55, *sec.* 24.

The practice, in such cases, is, upon the recovery of the lunatic, to apply to the court, upon petition and affidavits, to supersede or suspend the commission. Notice of the motion should be given to the committee, accompanied with copies of the papers on which the same is founded. For forms, see *Appendix*, Nos. 121, 122.

Upon the hearing of the application the attendance of the lunatic is usually required; and strong affidavits should be furnished to the court, made by medical men, or other competent persons, showing the restoration of a sound state of mind. 1 *Coll. on Lun.* 324. Persons who are in the habit of associating with, or watching the lunatic, are competent to give evidence as to his sanity. *Ib.* 328.

And the court may itself, upon inspection of the lunatic, and the examination of the petition and other papers, suspend or supersede the commission; or it may refer the matter to a referee to take proof of the facts, and to examine the lunatic if he thinks proper, and to report the proof, and his opinion thereon,—and on the coming in of his report, then decide the matter. 3 *Johns. Ch. R.* 567; 2 *Coll. on Lun.* 746. Or, the court may allow an issue to be made up and tried by a jury. 6 *Johns. Ch. R.* 440. For forms of order superseding commission, order of reference, referee's report and order thereon, see *Appendix*, Nos. 123 to 126. And in a case where the lunacy was satisfactorily established in the first instance, and the opinion of the court, after repeated applications of the party for a discharge of his committee, remained unchanged, the trial of the question was directed to be at the expense of the lunatic or his friends, and not at the charge of his estate, which consisted of personal property only, acquired

by the industry and skill of his wife, and barely sufficient for the maintenance of herself and children and of her husband. *Ib.; and see Will. Eq. Jur.* 689.

Where a party has been found an habitual drunkard, the court will not discharge his committee and restore the property to him upon mere proof of the fact that he is competent to manage his affairs, without evidence of a permanent reformation. And it seems, the late Court of Chancery required, as a general rule, as evidence of a perfect reformation, satisfactory proof that the habitual drunkard has voluntarily refrained from the use of intoxicating liquors for at least one year immediately preceding the application for the restoration of his property. 7 *Paige*, 312.

The commission may also be superseded if it has remained unexecuted for several years, with costs to be paid by the person guilty of the laches. 1 *Coll. on Lun.* 329; 2 *Atk.* 52.

And so, where a feigned issue has been awarded to a party, who has been found by inquisition to be a lunatic, and upon the trial of such issue, the party is found not to be of unsound mind, the proceedings upon the commission will be discharged, and he will be restored to the full control of his property. 11 *Paige*, 638.

But the court, instead of superseding the commission, in the first instance, may suspend its operation, in whole or in part, either indefinitely or for a limited time, where there is reason to believe that the party has not fully recovered, or there is danger of a relapse. 2 *Barb. Ch. R.* 210; *Mose.* 332; *Jacob.* 404. In such cases, the party will be permitted to have the control of his estate; the powers of the committee being suspended. *Id. ibid.* For form of order, see *Appendix*, No. 123.

And the court may suspend the operation of the commission for a particular purpose only; as, to enable the individual found to be a lunatic to make a testamentary disposition of his property, where he has sufficiently recovered his reason to be able to do so with sense and judgment. 2 *Barb. Ch. R.* 208. And an application for that purpose is addressed to the discretion of the court, and may be made ex parte, or

on notice to the committee and next of kin, as the court may direct. 4 *How. Pr. R.* 34.

But the commission, it seems, cannot be *superseded* as to the person, and retained as to the estate. So held, where the party found to be a lunatic, applied to have the committee of his person discharged, alleging that he was so far restored to reason as to be able to govern himself; where it did not appear that he was competent to manage his estate, and no application was made for the discharge of the committee of the estate. *Matter of Burr*, 17 *Barb.* 9; *and see* 2 *Phil.* 242. The commission, however, may be *suspended* as to the person, and retained in force as to the estate. *Matter of Burr*, before Harris, J., 1854; *see Will. Eq. Jur.* 690. And it may be suspended in part both as to the estate and the person. Thus, in the case of Burr, above referred to, the Supreme Court so far suspended the commission both of the person and the estate, as to allow the lunatic, from time to time, to receive portions of the income of his estate, and finally the whole income, and to invest or expend it in such manner as he should judge best, leaving the committee of the estate, in other respects, in the full control of the property. MS. *before Willard, J., Saratoga Sp. T.; Will. Eq. Jur.* 690.

Affidavit of Lunatic, &c., how Certified.] If a petition or affidavit in the proceedings, is sworn to by one who has been found by inquisition to be a lunatic or an habitual drunkard, or a person of unsound mind, the officer before whom it is sworn should state in the jurat that he had examined the petitioner or deponent, for the purpose of ascertaining the state of his mind, and whether he was capable of understanding the nature and object of the petition or affidavit, and that he was apparently of sound mind and capable of understanding the same. *See* 5 *Paige*, 242. And if the party is blind, the officer should also certify that the petition or affidavit was carefully and correctly read over to him in the presence of such officer, before it was sworn to. *Ib.* 243. For form of certificate, see *Appendix*, No. 127.

Removing or Discharging Committee.] The committee may, at any time, be removed for any misconduct, upon petition and sufficient affidavits, or on inquiry before a referee. *Shelf. on Lun.* 193; 8 *Paige*, 150. And where the committee has been guilty of gross negligence, he will be charged with the costs of the proceedings against him, to obtain his removal, and the settlement of his accounts. 3 *Paige*, 146.

The committee may also be discharged on his own application. But where he has voluntarily accepted the appointment, he cannot be discharged without showing some valid excuse for resigning the trust. And the fact that his situation is rendered unpleasant, in consequence of controversies existing between different members of the lunatic's family, is not sufficient for that purpose. *Ib.* 251.

Upon the removal or discharge of the committee, it will be referred to a referee, if necessary, to take and state an account between the committee and the estate of the lunatic. And where the court designates a referee for that purpose, it will be irregular and improper for the parties to substitute another referee in his place, without the sanction of the court. *Ib.* 146.

Remedy of Persons having Claims against Lunatic's Estate.] After a person is declared, by inquisition, to be a lunatic, it is a contempt of court for a creditor, or other person, who is informed of the proceedings, to sue the lunatic, or to levy an execution upon his property, or otherwise to interfere with it, without the permission of the court. 2 *Paige*, 422; 3 *Id.* 199; 5 *Id.* 489. And such creditor, or other person, upon a proper application by the committee, will be restrained from such interference. *Id. ibid.;* 13 *Barb.* 424.

The court will see, however, that the legal and equitable rights of creditors and others are protected and enforced. And the proper course for the creditor whose claim is disputed or refused to be paid by the committee, is to apply to the court, by petition, for the payment of his debt out of the lunatic's estate; or for leave to establish his claim by action, or by reference. For form of petition, and

notice of motion, see *Appendix*, Nos. 128, 129. If the court is satisfied that the debt is justly due, the committee will be ordered to pay it out of the estate; or if the claim is doubtful, the court will either have it settled by a referee, on a reference for that purpose, or will permit the party to establish his claim by action, as may be proper, under the particular circumstances of the case. 2 *Paige*, 422; 3 *Id.* 199; 5 *Id.* 489; 5 *How. Pr. R.* 109. For form of order, see *Appendix*, No. 130.

If a reference is ordered, the referee will proceed in the usual manner, and after having taken testimony, and other proofs presented, will make his report to the court. And upon the coming in of his report, the same must be filed, and a note of the day of filing entered by the clerk in the proper book, under the title of the proceeding; and such report will become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein. *Supreme Court Rules*, 1858, *No.* 32.

Where the court, upon the application of a creditor, settles and adjusts the amount due, and directs the committee to pay the same out of the lunatic's estate, together with the costs of the application, and the committee does not comply with the order, the remedy of the creditor is to compel a compliance by summary proceedings against him. *See* 8 *Paige*, 146. And it is erroneous for the court, upon the settlement of the claim, to direct an action to be brought by the creditor, in case the committee neglects or refuses to pay it. *Ib.*

If an action to establish a claim is directed by the court to be brought against the committee, it is proper, it seems, to make the lunatic or drunkard also a party defendant in the suit; so as to make the proceedings binding upon him in case the commission should be superseded before the suit is terminated. *Ib.; and see* 6 *Paige*, 237.

Duty and Authority of the Committee.] The first and

paramount rule in lunacy, &c., is to provide for the personal ease and comfort of the lunatic. 1 *Beat.* 268; 2 *Ves. jun.* 72. And it is the duty of the committee of the person to administer to the lunatic all the comfort and amusement that the nature of the case will admit, or his funds will afford. He is to be treated with great kindness, and all reasonable means of restoration employed *Shelf. on Lun.* 142, 154; 17 *Barb.* 14. And the committee is responsible for the consequences of any neglect to take proper care of him. *See* 5 *Paige*, 120.

In the management of his estate the interest of the lunatic is more to be regarded than the contingent interest of the real and personal representatives. 3 *Johns. Ch. R.* 347; 1 *Ves. jun.* 296; 8 *Ves.* 8. And though the committee ought not, in general, to vary the nature of the property, so as to affect the right of succession, yet he may do this under the direction of the court, where it is necessary for the benefit of the lunatic. *Id. ibid.;* 1 *Beat.* 268. Thus, the court may direct real estate to be converted into personal, or personal into real, when the interest of the lunatic requires it. 3 *Johns. Ch. R.* 347, *supra;* 9 *Paige*, 440. The court, however, as we shall see hereafter, cannot direct the sale or other disposition of the real estate of a lunatic, except where it is necessary for his maintenance, or the maintenance of his family, or the education of his children, or the payment of his debts; nor in any of these cases if the personal property is sufficient for the purpose. 2 *R. S.* 53, *secs.* 11, 16, *post;* 2 *Paige*, 596; 7 *Id.* 312. But the court may direct the committee to apply the surplus income to the improvement of unproductive real estate; and also to apply a portion of the capital of the personal estate in building upon vacant lots, so as to produce an income from the improvements. 9 *Paige*, 441.

Nor is the maintenance of the lunatic limited to the amount of income. 3 *Moll.* 94. But the whole estate, real and personal, may be expended in his support; after which, on the application of the committee, and upon report of a referee, the court will order the lunatic to be delivered over to the overseers of the poor. 2 *Johns. Ch. R.* 440.

Where the lunatic resides in another State, and has property in the hands of his committee appointed at the place of his residence, that property is the primary fund for his support, and should be first applied for that purpose by the committee who has the control of his person. 9 *Paige*, 611.

The committee, under the direction of the court, has also the entire control of the person of the lunatic, and the right to confine him, if necessary. 2 *Hoff. Ch. Pr.* 262. And where the lunatic becomes furiously mad, or so far disordered in his senses, as to endanger his own person, or the person or property of others, if permitted to go at large, if he is possessed of sufficient property to maintain himself, it is the duty of the committee to provide a suitable place for his confinement, and to confine and maintain him in such manner as shall be approved by the overseers of the poor of the city or town. 2 *R. S.* 634.

In respect to an habitual drunkard, the committee has the right, also, subject only to the superintending control of the court, to decide as to the proper residence of the drunkard; and he is responsible for any neglect to take proper care of the person of such drunkard. And the court will aid and protect the committee in the exercise of that right; and give him directions on the subject, when necessary. 5 *Paige*, 120. And where a third person, against the wishes of the committee, has the custody of or harbors the habitual drunkard, it is the duty of the committee to apply to the court, in the first instance for an order that the drunkard be delivered up to the committee, or that such person cease from harboring him; and if such order is disobeyed, the party will be punished for a contempt of court. *Ib.*

And so, also, where vendors of intoxicating drinks furnish the same to a drunkard against the wishes of his committee, the court will make an order prohibiting them from doing so upon pain of being held liable for a criminal contempt. And if the order is disobeyed, it is the duty of the committee to apply to the court to punish the offender. 7 *Paige*, 312; 3 *Id.* 200.

If necessary for the reformation of an habitual drunkard, the court, it seems, will direct the committee to confine him in the lunatic asylum; and his real estate may be sold for the purpose of paying the expenses of his support there. 7 *Paige*, 312.

In respect to the property of a lunatic, as a general rule, the committee cannot enter into any transaction or contract, without the authority of the court. Nor can he institute suits in behalf of the estate, without such authority. When authorized to bring any action for any debt, claim, or demand transferred to him, or to the possession and control of which he is entitled as such committee, he may sue for the same in his own name. *Laws of* 1845, *p.* 90; 12 *How. Pr. R.* 287. In all other cases the action must be brought in the name of the lunatic. 8 *Barb.* 552; *but see* 14 *Id.* 488.

If the lunatic's estate is large, and its interests require the employment of an agent or clerk, the court, upon the petition of the committee, will allow him to employ such agent or clerk, and to pay him a reasonable compensation for his services, out of the income of the estate. 9 *Paige*, 440. But the committee himself cannot receive a compensation for services as such clerk beyond his allowance for commissions as the committee. *Ib.*

If waste is committed upon the lands of the lunatic, it is the duty of the committee to apply to the court for an order to restrain it; and the court may make such order without an action commenced for that purpose. *See* 7 *Johns. Ch. R.* 24; 1 *Ball & Beatty*, 108. And if there is a breach of the order, the committee may move for an attachment. *Id. ibid.*

In case of the death of the lunatic, &c., the power of the committee ceases; and his real estate will thereupon descend to his heirs, and his personal estate be distributed among his next of kin, in the same manner as if he had been of sound mind and memory. 2 *R. S.* 55, *sec.* 25.

Committee to file Inventory and Account.] It is also made the duty of the committee, within six months after his ap-

pointment, to file with the clerk in whose office the appointment of the committee is entered, a just and true inventory, of the whole real and personal estate of such lunatic, &c.; stating the income and profits thereof, and the debts, credits, and effects, so far as the same have come to the knowledge of such committee. And whenever any property belonging to such estate shall be discovered after the filing of any inventory, it is also the duty of the committee to file a just and true account of the same, from time to time, as the same shall be discovered. 2 *R. S.* 53, *sec.* 8.

And the committee is also annually, after the first inventory is filed, so long as any part of the estate, or of the income or proceeds thereof, remains in his hands, or under his care or control, to file in the same office an inventory and account, under oath, of his trust, and of any other property belonging to the estate which he has since discovered, and of the amount remaining in his hands, or invested by him, and of the manner in which the same is secured or invested; stating the balance due from or to him at the time of rendering his last account, and his receipts and expenditures since that time, in the form of debtor and creditor. *Rules of the late Court of Chancery*, *No.* 154; *Laws of* 1848, *p.* 407, *sec.* 8; 2 *Barb. Ch. Pr.* 238. For forms of inventory and account, see *Appendix*, No. 131.

If the committee neglects to file an inventory, or to render his accounts regularly under oath, in the settlement of his accounts every presumption will be taken most strongly against him. 3 *Paige*, 146; *and see* 2 *Id.* 409. And the court appointing the committee may compel the filing of the inventory, by the order and process usual in such cases. 2 *R. S.* 53, *sec.* 10.

Before filing the inventories they must be verified by the oath of the committee, to be taken before a judge of a court of record. 2 *R. S.* 53, *sec.* 9.

Compensation of the Committee.] The committee will be allowed for his services, the same compensation as that fixed

by the Revised Statutes for the allowance to be made to executors and administrators. 9 *Paige*, 440; and see, 6 *Id.* 213. And for their services they are allowed:

1. For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five dollars per cent;

2. For receiving and paying any sums exceeding one thousand dollars, and not amounting to five thousand dollars, at the rate of two dollars and fifty cents per cent; and,

3. For all sums above five thousand dollars, at the rate of one dollar per cent.

And in all cases such allowance shall be made for their actual and necessary expenses as shall appear just and reasonable. 2 *R. S.* 93; *Laws of* 1849, *p.* 218.

The commissions above provided by statute, are intended to be a full compensation for the personal services of the committee; and he cannot be allowed any greater or other compensation. 9 *Paige*, 440; 6 *Id.* 213; and see 2 *Id.* 287; 8 *Id.* 412.

But although the committee cannot be allowed for his services, any greater or different compensation than is allowed by way of commissions to executors and administrators, yet where the interests of the estate require it, the committee, under the direction of the court, may employ an agent or clerk, and pay him a reasonable compensation for his services out of the income of the estate. 9 *Paige*, 440. And in the matter of Burr, before referred to, the court allowed the committee of the estate to employ a clerk at an annual salary; and a salary was also allowed to the committee of the person. The necessity for such allowance will depend on the amount of property to be managed, and various other circumstances. In Burr's case, the property amounted to about two hundred and fifty thousand dollars, and the lunatic, in addition to the committee of the person, was furnished with a companion, who attended him on his journeys and elsewhere, and to whom a salary was also paid. *Will. Eq. Jur.* 691; and see 2 *Barb. Ch. R.* 208; 17 *Barb.* 10.

Authority of the Court over the Lunatic's Estate.] With respect to the control which the court has over the estate of a lunatic, it has been decided that the court may, out of the surplus income of such estate, provide for the support of persons not his next of kin, and whom the lunatic is under no legal obligation to support, where it appears satisfactorily to the court that the lunatic himself would have provided for the support of such persons had he been of sound mind. 2 *Barb. Ch. R.* 326; 11 *Paige*, 256. And the court may also make an allowance out of the income of a lunatic's estate for the education of persons adopted by him as children before his derangement. *Id. ibid.*

And so, where the lunatic's estate is more than sufficient for his support and for the support of those of his relatives for whom he is legally bound to provide, the court may direct an allowance to be made out of such estate to his near relatives who are in need of assistance. And it seems this is done almost as a matter of course, in reference to the children of the lunatic, or other descendants, who are presumptively entitled to his estate in case of his death; and where there is but little or no hope of his recovery. 11 *Paige*, 259, per Walworth, Ch.; *Shelf. on Lun.* 161. In all such cases, the court acts in reference to the lunatic's estate, as it supposes the lunatic himself would have acted, if he had been of sound mind. *Id. ibid.*

In reference to the practice of the courts on applications for allowances, and in explanation thereof, Lord Eldon on one occasion remarked: "When the court is called upon to make an allowance, it has nothing to consider but the situation of the lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. With this view, only, in case where the estate is considerable, and the persons who will be entitled to it hereafter are otherwise provided for, the court, looking at what it is likely the lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons. So, where a large property devolves upon an elder

son, who is a lunatic, as heir-at-law, and his brothers and sisters are slenderly or not at all provided for, the court will make an allowance to the latter for the sake of the former, upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education, and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars. So, also, where the father of a family becomes a lunatic, the court does not look at the mere legal demand which his wife and children may have upon him, and which amounts, perhaps, to no more than may keep them from being a burden on the parish; but considering what the lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. But the court does not do this because they would be entitled, if the lunatic were to die to-morrow, to the entire distribution of his estate; nor necessarily to the extent of giving them the whole surplus beyond the allowance made for the personal use of the lunatic. The court does nothing wantonly, or unnecessarily, to alter his property; but, on the contrary, takes care, for his sake, that if he recovers he shall find his estate as nearly as possible in the same condition as he left it, applying the property, in the mean time, in such manner as the court think it would have been wise and prudent in the lunatic himself to apply it in case he had been capable." *Ex parte Whitbread*, 2 *Meriv.* 102.

But it seems, in cases of an allowance to the children of the lunatic, that adults in whose favor it is made, will be required to stipulate that the amounts advanced to them respectively shall be brought into hotchpot in the disposition of the lunatic's estate, upon his death, if any part of such estate shall come to them under the statute of distributions. 11 *Paige*, 257. Though it would be otherwise in respect to children of the lunatic who are sickly, or decrepit, so as to give them a special claim upon the estate for support. *Ib.* 259.

The court, also, may authorize the committee of the lunatic

to provide for keeping up the lunatic's family establishment, to the same extent as before the lunacy; and to place at the lunatic's disposal, so long as he is competent to judge of the claims of applicants, small sums of money for purposes of charity; and to pay for the support of the institutions of religion in the church where the lunatic and his family have been accustomed to worship, such sums as the lunatic may desire, not exceeding the amount which the lunatic had been in the habit of paying annually, before his faculties became impaired. *Ib.; and see* 2 *Barb. Ch. R.* 326.

But the committee will not be allowed personally to expend any part of the estate of the lunatic for general charity, or for objects of benevolence, or piety, for which the lunatic himself had not been in the habit of contributing specifically and regularly while he was competent to manage his own affairs. *Id. ibid.* And see further on this subject, *Will. Eq. Jur.* 685; *Shelf. on Lun.* 160.

Costs of the Proceedings.] The person who petitions for and prosecutes a commission of lunacy, is entitled to be repaid the costs and expenses properly incurred by him. 1 *Coll.* 461. And the committee of a lunatic, &c., may pay to such petitioner, or to his attorney, the costs and expenses of the application and of the subsequent proceedings thereon, including the appointment of the committee, and without an order of the court for the payment thereof, when the bill of such costs and expenses has been duly taxed and filed with the clerk in whose office the appointment of the committee is entered; provided the whole amount of such costs and expenses does not exceed fifty dollars. But where the costs and expenses exceed that amount, the committee is not at liberty to pay the same out of the estate in his hands, without a special order of the court directing such payment. *Sup. Court Rules*, 1858, *No.* 85.

If the petitioner fails to establish the lunacy, he must bear his own costs. And in such case, also, he will be charged with costs in favor of the alleged lunatic upon evidence showing bad faith, or a want of probable cause for the commence-

ment of the proceedings. It would be otherwise, however, where he proceeds in good faith. And in a case where a jury legally impanneled, found the party proceeded against a lunatic, such finding is presumptive evidence that the petitioner acted in good faith, and upon probable cause, although another jury upon the trial of a feigned issue have found the other way. 11 *Paige*, 638; *and see* 1 *Id.* 498.

The court may also in its discretion, allow to the attorney of the party proceeded against the costs of opposing the commission; though as a general rule, it seems the court will not allow the costs of an unsuccessful opposition, for the reason that a party who is really a lunatic is not benefited thereby. 8 *Paige*, 451, per Walworth, Ch. Nor has the attorney in such case, where the jury also find the party to have been a lunatic at the time of the alleged retainer, any legal claim against the estate on the ground of contract; he is not a creditor of the lunatic, who was incompetent to make a valid agreement to pay him for opposing the commission. *Ib.* The taxable costs, however, will be allowed in such cases, in the discretion of the court, where the fact of the lunacy is so much a matter of doubt, that the court if it had been applied to for that purpose, would have directed or sanctioned such opposition. *Ib.*

The allowance of costs out of the estate to pay the expenses of an issue and trial, to test the question whether the party proceeded against is a lunatic, is discretionary, and depends upon the character of the application, and the conduct of the party. 4 *Johns. Ch. R.* 170. Where the party applying is the alleged lunatic, and the estate is large, or able to defray the expenses of the trial, the court will generally make a suitable allowance. In one case, the sum of twenty-five dollars was allowed. 1 *Paige*, 583. In another, the allowance was not fixed by the court; but the committee was directed to pay such reasonable sums as should be requisite to procure the attendance of witnesses upon the trial, and for the employment of proper counsel before the court and jury. 1 *Barb. Ch. R.* 42. And in another case, where the lunacy was satisfactorily established in the first instance, and the opinion of the court after repeated applications of the party

for a discharge of his committee, remained unchanged, the trial was directed to be at the expense of the lunatic, or his friends, and not at the charge of his estate, which consisted of personal property only, acquired by the industry and skill of the wife, and barely sufficient for the support of the lunatic and his family. 6 *Johns. Ch. R.* 440. "In every case of this kind," says Chancellor Walworth, "the court must exercise a sound discretion, regulated by the particular circumstances, so that while the party proceeded against is not deprived of the means of protecting his legal rights, the property, which is necessary for the support of himself and his family, shall not be unnecessarily wasted in useless litigation." 1 *Paige*, 583.

Where the issue is awarded for the benefit of a third person, and it is found against him, the court will not allow costs out of the estate to the attorney who conducts the proceedings. *Ib.* 489. On the contrary, the party for whose benefit the issue is awarded, in such case, will be required to pay costs to the committee. 4 *Johns. Ch. R.* 489.

When costs are allowed, to be taxed, they are to be regulated by the fee bill applicable to proceedings in the late Court of Chancery, in force immediately previous to the 1st July, 1848. *See Code of Pro.* § 471; 16 *Barb.* 592.

SECTION II.

PROCEEDINGS FOR THE SALE OF THEIR REAL ESTATE.

INDEPENDENT of the statute, the courts have no authority to order the sale of the real estate of a lunatic, even for the payment of his debts; and this, although the heir at law and the next of kin consent to such sale. 5 *Ves.* 556; 2 *Paige*, 597; 7 *Id.* 312.

And under the provisions of the statute, the court cannot order a sale or other disposition of the lunatic's real estate, unless it is necessary for the payment of his debts, or the maintenance of the lunatic or his family, or for the education of his children. And even in those cases it cannot be done, if there is personal property sufficient for that purpose. *Id. ibid.*

And if the court, instead of ordering the estate to be sold or mortgaged, directs it to be leased, the lease cannot be given for a longer term than five years. 2 *R. S.* 55, *sec.* 23.

Before the application for leave to sell is made, if there is no committee of the estate, a commission of lunacy, &c., should be issued and returned, and a committee of the estate duly appointed; and until then the court has no jurisdiction to direct a sale. 8 *How. Pr. R.* 220.

Nor will an inquisition taken abroad, justify an application for the sale of a lunatic's real estate lying within this State. 2 *Johns. Ch. R.* 124.

I. *Application for a Sale to Pay Debts.*

When Sale, &c., will be ordered; and how applied for.] The statute provides that whenever the personal estate of any idiot, lunatic, person of unsound mind, or habitual drunkard, shall not be sufficient for the discharge of his debts, it shall be the duty of the committee of his estate to apply by petition praying for authority to mortgage, lease, or sell so much

of the real estate of such idiot, &c., as shall be necessary for the payment of such debts. 2 *R. S.* 53, *sec.* 11.

The petition must set forth the particulars and amount of the estate, real and personal, of such idiot, lunatic, or other person, the application which may have been made of any personal estate, and an account of the debts and demands existing against such estate. *Ib.* For form, see *Appendix*, No. 132.

If the committee neglects or refuses to apply for leave to sell the real estate, where the personal estate is insufficient for the payment of debts, the creditors may institute proceedings, by action, for that purpose. 2 *Johns. Ch. R.* 400. *Ib.* 242.

Where Application to be Made.] The courts having jurisdiction to order the sale of the real estate of a lunatic, &c., are the Supreme Court, the county court of the county where the real estate is situated, and the Court of Common Pleas of the city and county of New York, when the real estate is situated within the limits of that city. 2 *R. S.* 52, *secs.* 1, 11; *Laws of* 1847, *p.* 323, *sec.* 16; *Code of Pro.* § 30, *sub.* 6; *Laws of* 1854, *p.* 464, *sec.* 6. The like authority is also given to the Superior Court of the city of Buffalo, in respect to real estate situated therein. *Laws of* 1854, *p.* 224, *secs.* 9 *and* 11.

The application for leave to sell, however, cannot be made to any one of those courts, but only to the court by which the committee was appointed. 2 *R. S.* 53, *sec.* 11.

The application is ex parte, and should be made to the court, at special term, *see* 17 *Barb.* 348; though in respect to the county court, no notice being required, the application may be made at any term of the court, or even out of term, that court being always open for the transaction of such business. *Code of Pro.* § 31.

Reference, and Proceedings thereon.] On the presentation of the petition, the court will order a reference to some suitable and proper person, to inquire into and report upon

the matters contained in the petition. 2 *R. S.* 54, *sec.* 12. For forms, see *Appendix*, No. 133.

The referee, thus appointed, is required to examine into the truth of the representations made, to hear all parties interested in such real estate, and to report thereon with all convenient speed. *Ib.*

Notice of the reference should be served upon the next of kin of the lunatic, &c., a reasonable time before proceeding thereon. For form, see *Appendix*, No. 134.

Referee's Report, and Proceedings thereon.] The statute provides that if, upon the coming in of the report, and an examination of the matter, it shall appear to the court that the personal estate of the lunatic, &c., is not sufficient for the payment of his debts, and that the same has been applied to that purpose as far as the circumstances of the case rendered proper, an order will be entered, directing the mortgage, leasing, or sale of the whole, or such part of the said real estate as may be necessary to discharge the said debts. 2 *R. S.* 54, *sec.* 13. The order will also contain such directions respecting the time and manner of the sale as the court may deem proper; and should direct, also, that the sale be made subject to the approbation of the court. *Ib. sec.* 18. For form of report and order thereon, see *Appendix*, Nos. 135, 136.

Sale, by whom conducted.] If a sale is ordered by the court, it must be conducted by the committee, and not by a referee, 2 *R. S.* 53, *secs.* 11 *to* 18; though in a case where a sale was ordered upon proceedings instituted by bill in the Court of Chancery, the court directed the sale to be conducted by a master in conjunction with the committee. 2 *Johns. Ch.* 400; *and see Ib.* 242.

Report of Sale, and Confirmation thereof.] The committee, having contracted for the sale of the premises, should report the terms and conditions thereof to the court, upon oath. For form, see *Appendix*, No. 137. If the sale is ap-

proved, an order confirming the same will be entered. For form, see *Appendix*, No. 138. And until such report and confirmation, no conveyance can be executed. 2 *R. S.* 54, *sec.* 18.

Effect of Conveyance.] Every conveyance, mortgage, lease, and assurance, made under the order of the court, pursuant to the statute, is as valid and effectual as if the same had been executed by such lunatic, &c., when of sound memory and understanding. *Ib.* 55, *sec.* 21. For form of conveyance, see *Appendix*, No. 140.

Additional Security from Committee.] The court may require any additional security to be given by any such committee, for the faithful application and accounting for the proceeds of such mortgage, lease, or sale; and may require an account thereof to be rendered, from time to time. *Ib.* 54, *sec.* 14. For form of Bond, see *Appendix*, No. 139.

How Debts to be paid.] In the application of the moneys raised by any such mortgage, lease, or sale, the committee must pay all the debts in an equal proportion, without giving any preference to such as are founded on sealed instruments. *Ib. sec.* 15.

II. *Application for a Sale for Lunatic's Support.*

When Sale will be ordered, &c.] When the personal property, and the rents, profits, and income of the real estate, of any such lunatic, &c., is insufficient for his maintenance, or that of his family, or for the education of his children, the committee of his estate may apply by petition to the Supreme Court, or to the county court of the county where the premises are situated, or, in the city of New York, to the Court of Common Pleas of that city, when the premises are situated therein, or to the Superior Court of the city of Buffalo, if the premises are situated in that city,—for authority to mortgage or sell the whole, or so much of the real estate as shall be

necessary for that purpose. 2 *R. S.* 54, *sec.* 16; 2 *Paige*, 596; 7 *Id.* 312. *Code of Pro.* § 30; *Laws of* 1854, *p.* 464; *Ib. p.* 224, *secs.* 9, 11.

Reference, and Proceedings thereon.] Upon presenting the petition, the same reference and proceedings are to be had, and a like order entered, as directed in respect to the sale of the lunatic's real estate, for the payment of debts. 2 *R. S.* 54, *sec.* 16. And in addition thereto, the court will direct the manner in which the proceeds of the sale shall be secured, and the income or produce thereof appropriated. *Ib. sec.* 17.

Confirming Sale, &c.] The sale must be confirmed upon the report of the committee, upon oath, stating the terms thereof, before any conveyance of the premises can be executed. *Ib. sec.* 18. And when confirmed, and a conveyance of the premises is executed and delivered to the purchaser, such conveyance will be as valid and effectual as if the same had been executed by the lunatic when of sound mind. *Ib.* 55, *sec.* 21.

For the necessary forms on applications for the sale of the real estate of a lunatic, for maintenance, &c., see *Appendix*, No. 132, and *note*.

SECTION III.

MISCELLANEOUS MATTERS.

Application for Conveyance, where Lunatic is a Trustee, &c.] It is provided by the statute that whenever any idiot, lunatic, person of unsound mind, or habitual drunkard, shall be seized or possessed of any real estate by way of mortgage, or as trustee for others in any manner, his committee may apply to the Supreme Court for authority to convey and assure such real estate to any other person or persons entitled to such conveyance or assurance, in such manner as the court shall direct. 2 *R. S.* 55, *sec.* 19.

And the court may also, on the application of any person entitled to such conveyance or assurance, compel the committee, on a hearing of all parties interested, to execute such conveyance or assurance. *Ib. sec.* 20.

The Supreme Court has the power, under the above statutory provisions, to direct a specific performance by a lunatic heir of a contract for the sale of lands, made by a party who shall have died before the performance thereof. Thus, where such a contract was made, and the party died without performing it, leaving an only child as his heir at law, who was a lunatic,—it was held that a court of equity might decree a specific performance of the contract, and direct the committee of the lunatic to execute all necessary conveyances for the purpose. 1 *Barb. S. C. R.* 495; *Will. Eq. Jur.* 270. And see, also, the practice in respect to the performance by infant heirs of the contract of their ancestor, *post, Ch. XI.*

Application, where, and how, made.] The application must be made to the Supreme Court, at special term. 2 *R. S.* 55, *secs.* 19, 20; *Laws of* 1847, *p.* 323, *sec.* 16; 17 *Barb.*

348. It is founded upon petition, (*a*) addressed "To the Supreme Court of the State of New York," *Ib.*; 2 *R. S.* 55, *sec.* 20, *supra*; and should set forth clearly the facts on which the title to relief is founded; and should be verified in the usual form.

Notice of the application should be served upon the parties interested, in the usual manner, accompanied with copies of the papers on which the motion is founded. See *Ib. secs.* 19, 20.

Reference, and Proceedings thereon.] The court, upon the presentation of the petition, will direct a reference to some suitable person, to inquire into the truth of the representations made, to hear the parties interested, and to report thereon with all convenient speed. 2 *R. S.* 54, *secs.* 12, 19.

Notice of the hearing before the referee should be given to the parties interested in the usual manner.

Upon the coming in of the referee's report and confirmation thereof, the court will make an order directing the committee to execute a conveyance of the premises. *Ib. secs.* 19, 20.

If either party wishes to except to the report of the referee, the practice prescribed by Rule 32 (*Rules of* 1858), must be pursued.

Effect of Conveyance.] Every conveyance or assurance made in pursuance of the order of the court on such application will be as valid and effectual as if the same had been executed by such lunatic, &c., when of sound mind and memory. *Ib. sec.* 21.

Costs of the Application.] If the application is made for

(*a*) Where the proceeding is instituted to compel the committee to execute a conveyance, it may also be commenced by summons and complaint under the Code of Procedure. 2 *R. S.* 55, *sec.* 20; 1 *Barb. S. C. R.* 495.

a specific performance of a contract by the heir of the party who made the contract, and such heir is a lunatic, neither the lunatic nor his estate will be charged with the costs of the proceedings. 1 *Barb. S. C. R.* 495; *and see* 9 *Paige*, 280, 283; 2 *Ed. Ch. R.* 415.

Appeals from Order.] The order made upon the report of a referee, is an order in a special proceeding; and an appeal may be taken therefrom to the general term. *Laws of* 1854, *p.* 592; *ante*, *p.* 19, *note; and see* 1 *Kernan*, 52.

The practice upon the appeal is regulated substantially by the Code of Procedure; sections 327, 329, 330, and 332, of which, are made applicable in such cases. (*a*) *Laws of* 1854, *p.* 592, *supra; and see* 9 *How. Pr. R.* 304; *s. c.* 3 *Duer*, 616.

From the decision of the court, at general term, an appeal may be taken to the Court of Appeals. *Code of Pro.* § 11; *and see* 1 *Kern.* 52; *Ib.* 276; 2 *Id.* 409.

The costs upon appeals, when allowed, are in the discretion of the court; and are regulated by the Code of Procedure. *See Laws of* 1854, *p.* 592, *sec.* 3; *ante*, *p.* 16, *note; 9 How. Pr. R.* 304; *s. c.* 3 *Duer*, 616.

Specific Performance may be Decreed.] The statute provides that the court shall have authority to decree and compel the specific performance of any bargain, contract, or agreement, which may have been made by any lunatic, person of unsound mind, or habitual drunkard, while such lunatic, &c., was capable of contracting; and to direct the committee of such person to do and execute all necessary conveyances and acts for that purpose. 2 *R. S.* 55, *sec.* 22.

Proceedings thereon.] The application should be made to the Supreme Court, at special term. *Ib.; and see Laws of* 1847, *p.* 323, *sec.* 16. It is founded upon petition, upon the presenting of which the usual reference will be ordered.

(*a*) See those sections, *ante*, p. 20.

And upon the coming in of the referee's report, an order may be made directing a specific performance, according to the circumstances of the case.

In general, in respect to the proceedings subsequent to the application to the court, the practice is the same, substantially, as upon an application to compel a conveyance of real estate held in trust by the lunatic. See, in such case, *ante*, p. 192.

Limitation of Authority over Lunatic's Real Estate.] The real estate of any idiot, lunatic, person of unsound mind, or person incapable of conducting his affairs in consequence of habitual drunkenness, shall not be leased for more than five years, or mortgaged, or aliened, or disposed of, otherwise than is directed by the statute. 2 *R. S.* 55, *sec.* 23; 2 *Johns. Ch. R.* 403.

Partition of Lunatic's Estate.] The Supreme Court, on the application of the committee of any lunatic, &c., may authorize such committee to agree to the partition of any real estate owned by such lunatic as a joint tenant or tenant in common with others, and to execute releases of the right of such lunatic in and to the share falling to the other owners. 2 *R. S.* 331, *secs.* 89 to 91. For the practice, in such case, see Chapter IX, *post*, relating to the partition of real estate.

Estate, how disposed of, on Death of Lunatic.] The statute provides, that in case of the death of any idiot, lunatic, person of unsound mind, or person incapable of conducting his affairs, during such state of incapacity, the power of any trustees appointed under the provisions of the statute, shall cease, and his real estate shall descend to his heirs, and his personal estate be distributed among his next of kin, in the same manner as if he had been of sound mind and memory. 2 *R. S.* 55, *sec.* 25.

CHAPTER VII.(a)

LIEN LAWS IN FAVOR OF MECHANICS AND OTHERS.

Section I. Lien law relating to the city and county of New York.

II. Lien law relating to all the counties of the State, except the counties of New York and Erie.

SECTION I.

LIEN LAW RELATING TO THE CITY AND COUNTY OF NEW YORK.

The first act upon the subject of liens in favor of parties performing work or furnishing materials, in the erection or alteration or repairing of buildings in this State, was passed

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(a) The consideration of the subject of the "Lien Laws" of this State, was not originally contemplated in this work; but the legislature, at its late session, having passed an act (*Laws of* 1858, *p.* 324) extending the provisions of the lien law relating to the counties of Westchester, Oneida, &c., passed April 17, 1854, to all the counties of the State, except the city and county of New York and the county of Erie, which were in part already provided with similar laws, it was thought that a work relating to proceedings of a special nature, would be incomplete without it. This chapter, therefore, is devoted to the subject of those laws and the practice under them.

In respect to the lien law relating to the city and county of New York, it having no operation beyond the bounds of that city, and the practice under it having been considered at length in the valuable treatise of Charles C. Nott, Esq., entitled, "A Treatise on the Mechanics' Lien Laws of the State of New York," the consideration of it here might, perhaps, even now, have been omitted entirely. But that law has been in operation several years, and a system of practice has grown up under it, established by numerous decisions of the Court

on the 20th of April, 1830, and applied exclusively to the city and county of New York. *Laws of* 1830, *p.* 412. That act, with the amendments, alterations, and additions subsequently made (*Laws of* 1832, *p.* 181; *Laws of* 1844, *p.* 339), constituted the law on the subject of liens in that city, until those statutes were repealed by the act of July 11, 1851, and another act substituted in their place. *Laws of* 1851, *p.* 953; *Davis' Laws of New York City*, 1069. The last-mentioned act, with an amendment to the same, passed April 13, 1855, (*Laws of* 1855, *p* 760; *Dav. Laws of New York City*, 1198), now constitute the only statute on this subject relating to that city.

I. *Proceedings to Create a Lien.*

In what Cases a lien may be Created.] The statute provides that any person who shall, by virtue of any contract with the owner thereof or his agent, or any person who, in pursuance of an agreement with any such contractor, shall, in conformity with the terms of such contract, perform any labor or furnish materials in building, altering, or repairing any house or other building, or appurtenances to any house or other building, in the city and county of New York, shall, upon filing the notice prescribed by the statute, have a lien for the value of such labor and materials upon such house or building and appurtenances, and upon the lot of land upon which the same stand. *Laws of* 1851, *p.* 953, *sec.* 1.

The term "appurtenances," used in the statute, would probably be held to apply to the flagging of sidewalks, yards, and areas of buildings in the process of erection; and to the work and labor performed and materials furnished for the same. *See* 4 *Selden*, 387, per Taggart, J.; 2 *E. D. Smith*, 675, *and note.*

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of Common Pleas of New York, which have been reported; and which decisions, or many of them, are applicable to the general law. It was, therefore, deemed advisable to consider the subject in reference to that city. An acquaintance with the decisions referred to, and the statute upon which they are founded, seems necessary to a full and proper understanding of the subject in general.

With respect to the character of the labor performed or materials furnished, it seems that a party may acquire a lien under the statute upon a claim for furnishing to the contractor hoisting apparatus, and labor in the use of it, upon the erection of a building owned by the defendant. 1 *Id.* 722. And so, also, it seems, upon a claim for lightning rods furnished and the labor in attaching the same. 2 *Id.* 595; *and see Nott's Lien Law*, 97, 99; 22 *Wend.* 395.

And the lien may be acquired under the statute, whether anything has become due from the owner to the contractor or not; but it is sufficient if moneys may become due afterwards, which the owner may be compelled to apply to the satisfaction of the lien. 1 *E. D. Smith*, 626; *Id.* 681; *Id.* 728. Nor is it necessary, even, that the claim of a party dealing with the contractor should be due, to entitle such party to a lien. *Id.* 739, 744, 747. And where such party took the note of the contractor for the amount of the work and materials, and subsequently thereto, and before the note became due, filed his notice to acquire a lien,—it was held that the taking of the note did not deprive him of his right to acquire a lien under the statute, although the lien could not be enforced before the note became due. *Ib.;* 2 *Id.* 657, *Ib.* 621. And where, in such case, the claimant endorsed and transferred the note to a third party, who obtained a judgment thereon, which remained unsatisfied and in full force,—it was held, that the claimant could not recover without showing that he had become reinvested with the title to the debt; and that the mere production of the note at the trial, and offering to give it up to be canceled, was not sufficient. *Ib.* 621, 635.

A lien may also be acquired for work performed or materials furnished since the act took effect, although the contract was made before the act was passed. 1 *E. D. Smith*, 681; *s. c.* 8 *How. Pr. R.* 207; 1 *E. D. Smith*, 739; 3 *Id.* 666; *s. c.* 4 *Abb. Pr. R.* 472. It would be otherwise, however, in respect to work performed and materials furnished before the passage of the act. 1 *E. D. Smith*, 695. See further on this subject, *post*, p. 203.

By whom it may be Created.] The lien, as we have seen by the statute, may be acquired by the original contractor with the owner or his agent, or by any person who, in pursuance of an agreement with any such contractor, shall perform the labor or furnish the materials. *Laws of* 1851, *p.* 953, *sec.* 1. And if the lien is in favor of the contractor such labor or materials must have been performed or furnished by virtue of a contract with the owner or his agent; or if in favor of a sub-contractor, in conformity with the terms of that contract. *Ib.*

The right to acquire a lien is confined by the statute to the original contractor, and his sub-contractor, or employee, or person furnishing materials; and, therefore, the creditors or employees of the sub-contractor, or persons furnishing materials for him, cannot acquire a lien. *Ib.; and see* 1 *E. D. Smith*, 716, *and note; and* 17 *Wend.* 550, *aff.* 22 *Id.* 395.

Nor can the assignee of a claim for work and labor, or materials furnished, acquire a lien under the statute. 4 *Abb. Pr. R.* 263; *s. c.* 3 *E. D. Smith*, 632. The statute confers only a personal right on the contractor, or laborer, or person furnishing materials, and not any right upon his assignee. *Id. ibid.*

Against whom it may be Created.] By the statute, the lien must be obtained against the owner of the house, or other building, or appurtenances to any house or other building, upon which the work has been performed, or for which the materials have been furnished. *Sec.* 1, *supra.*

But the person against whom the lien is sought, need not have the legal title to the premises upon which the building stands. Thus, in a case under the law of 1830, where the owner contracted to convey the premises to a purchaser, and to loan him money in installments, for the erection of a building thereon, the purchase money and the sums lent to be secured by bond and mortgage upon the premises at the completion of the building, at which time the premises were to be conveyed,—it was held that the person agreeing to sell the

premises was not the owner of the building within the meaning of the statute, although it was erected on lands of which he had the legal title. 5 *Selden*, 435; *s. c.* 2 *E. D. Smith*, 681. And the same construction has been given to the present statute. 1 *Id.* 725; *and see Id.* 652, *and note;* 2 *Id.* 543, 548, *note;* 1 *Duer*, 676.

Nor is it necessary, in such cases, that the contract to convey the premises to the purchaser should be in writing, subscribed by the party to be charged; but it may be by parol. Thus, where A, owning the fee of the land, agrees by parol ultimately to convey it to B; and to loan B money to aid in erecting a building thereon; and the latter proceeds to erect such building,—A is not the owner of the building within the meaning of the statute, so that his interest in the premises can be subjected to a lien for the value of work or materials furnished by third parties under the employment of B. 2 *E. D. Smith*, 662.

So, it is sufficient, under the statute, if the party proceeded against is the owner of the building; and it is not necessary that he should be the owner of the land also. As, where a sub-tenant erects a building upon the demised premises, which he claims the right to remove when his tenancy ceases, he is to be deemed the owner of the building, within the meaning of the statute; and the proceeding may be instituted against him. 21 *Barb.* 520. The lien would extend to his interest in the building, and also in the land, if he has any. *Ib.*

With respect to those who are owners in a representative capacity, as heirs, assignees, trustees, &c., see the observations in *Nott's Lien Law*, 108, 111. In the case of *Quimby* v. *Sloan*, where the owners conveyed the premises, in good faith, to trustees for the benefit of creditors, it was held that the contractors and others could not, by afterwards filing a notice of lien, acquire under the statute any lien upon the premises, although the notices were filed before the conveyance was recorded. 2 *E. D. Smith*, 594, 611; *and see* 3 *Id.* 678. Nor would they, in such case, acquire any lien as

against the grantees. *Id. ibid.* And per Woodruff, J., in giving the opinion of the court in the case first cited: "In order to the acquisition of the statute lien, the statute itself must be strictly pursued, and there is in this no inequity. The plaintiff claims the benefit of a right not existing at the common law. He claims the benefit of a summary proceeding for the enforcement of that right. He has his own option at any time within six months to secure himself by filing his notice. If he allow the time to pass until the owner has sold the property, he cannot complain; he still has his action for the debt. He only fails by his own delay to secure the benefit of the statute." (*a*) Nor does it make any difference, in such case, that the deed was not recorded until after the notice of lien was filed. "The plaintiffs acquired no lien while the owners had any right, title, or interest. That had passed to the grantees, and passed effectually, whether the deed was recorded or not." 2 *Id.* 613, 614; *and see Id.* 616.

And so the death of the owner is fatal to a lien subsequently obtained; so held where the contracting owner died, and the contractor afterwards filed his notice to acquire a lien, specifying the amount of his claim, the name of the deceased owner, and the names of his executors; it not appearing that a devise of the premises in question had been made by the testator to his executors. *Id.* 583. And the court, per Ingraham, F. J., remarks: "If no lien has been created prior to the death of the owner, and the title has passed to another, whether by purchase, devise, or otherwise, no lien can be acquired against such subsequent owner by proceedings

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(*a*) Whether upon any equitable principle, parties furnishing materials, either apart from the statute or as an incident thereto, have a lien, as vendors or otherwise, for the purchase money, which gives them priority over rights acquired by the owner's grantees, and which might be enforced in a court having general equitable jurisdiction, *quære?* 2 *E. D. Smith,* 594. But no lien can be acquired in such case, which can be enforced by the proceedings authorized by the statute, although such proceedings are instituted and conducted in a court having such jurisdiction. *Ib., and see Id.* 616.

founded on claims arising under a contract with the deceased owner." *Ib.* 589. And in respect to the question whether a lien could be acquired against an executor in any case, the same judge further observes: "There may be cases where such a proceeding can be instituted against executors, such for instance as that of a devise by the testator, of his real estate to his executors; but without title to the property of the testator on which the lien exists, no such proceeding can be maintained against the executors of the deceased owner." *Ib.*

In respect to married women, having separate estates, it seems it is doubtful whether they can make a contract for the erection of a building; or whether they can, by any contract, subject such building to a lien, except by mortgage or other pledge, in writing, duly acknowledged.(*a*) 1 *E. D. Smith*, 729; *Nott's Lien Law*, 106. Where, however, labor is performed, or materials furnished upon buildings which are the separate property of a married woman, it may form the basis of an equitable claim against the property, which may be enforced as such, under the statute. 4 *Abb. Pr. R.* 472; *s. c.* 3 *E. D. Smith*, 666; *and see* 21 *Barb.* 551; 22 *Id.* 371.

Extent of Owner's Liability.] It is provided by the statute that the owner of the building and premises shall be liable to the contractor, or other party entitled to a lien, for the value of the work performed and materials furnished, to the extent of the right, title and interest of such owner, in the house or building and appurtenances, and the lot upon which the same stand, existing at the time the notice of lien is filed;

(*a*) But see the case of *Berry* v. *Weisse and Wife, in note to* 2 *E. D. Smith R.* 662, before Hon. Michael Ulshoeffer, as referee, where it is intimated that the husband and wife together may make a contract for improvements upon the separate estate of the wife, and that proceedings may be taken under the statute to enforce the lien obtained by the contractor; but that to entitle the contractor to proceed under the statute, there must have been an express written contract, executed by both the husband and wife, and acknowledged by the latter as a married woman upon a private examination apart from her husband.

but that such owner shall not be obliged to pay, for or on account of such house, other building, or appurtenances, in consideration of all the liens authorized by the statute to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract. *Laws of* 1851, *p.* 953, *secs.* 1 *and* 2; 1 *E. D. Smith*, 700.

The owner's liability is thus limited by the statute, first, to the extent of his interest in the building, &c., at the time the notice of lien is filed; and second, to the amount agreed to be paid by him to the contractor.

In respect to the former limitation, it is well settled that the claimant, in his proceedings against the owner, is confined to the building, &c., which has been erected, or altered, or repaired, and to the lot of land upon which the same stands; and no judgment, under the statute, can be awarded against the owner personally, where he is not personally liable by contract to the claimant. 1 *E. D. Smith*, 626; 2 *Id.* 589; *Id.* 595; *Id.* 657; *Id.* 664.

The owner's liability is also limited to the amount due upon his contract, at the time the notice of lien is filed; and this, too, whether the lien is in favor of the original contractor, or a sub-contractor, or other party. Thus, the contract of the owner is conclusive as to the amount which he can be compelled to pay, if he has observed good faith and performed his contract according to its terms; and he cannot be compelled, in any event, to pay more than the contract price. "I regard this proposition," says Woodruff, J., "as lying at the foundation of the whole proceeding, and as declaratory of and controlling the rights of the parties. And, therefore, in applying the subsequent provisions of the statute, which are merely designed to secure and enforce those rights, we are to keep the provisions of this first section always in view, and mould or adapt the remedy, so far as it is entrusted to us, so as to effectuate the object, and, if possible, harmonize the whole."(*a*) 1 *E. D. Smith*, 639; *and see Id.* 647; *Id.* 651; *Id.* 692; *Id.* 681.

(*a*) In respect to the liability of the owner for costs, where the funds in his

And so, the contract is to govern in respect to the time when the moneys are to be paid; and therefore, the owner cannot be required to pay money to the claimant before it becomes payable according to the owner's agreement with the contractor. *Id. ibid.*

And where the owner has contracted with another for the erection of a building, all sub-contractors and others furnishing labor or materials to the contractor, must, so far as they rely upon the owner or his house as security under the statute, be deemed to do so in subordination to the owner's contract, and upon the credit which the terms of such contract offer for their reliance. *Id.* 626; *Id.* 641.

But it is sufficient if the claimant makes out in the first instance a *prima-facie* case; and this he can do by showing a contract between the owner and contractor, and a performance on the part of the contractor, which will entitle the latter to a payment under the contract. 1 *E. D. Smith*, 668; *Id.* 684; *Id.* 722. *Nott's Lien Law*, 115.

Where the contractor for the performance of work towards the erection of a building, abandons the work before the same is completed, and before any payments become due, so that by the terms of the contract the owner is not liable, the laborers and sub-contractors employed by the contractor, cannot, by filing the notice prescribed by the statute, acquire liens upon the building or lot of ground, and compel the owner to pay them for the work and labor actually performed by them. 2 *E. D. Smith*, 560; *s. c.* 1 *Abb. Pr. R.* 360; *and see* 4 *id.* 433; *s. c.* 3 *E. D. Smith*, 650. Nor can they acquire a lien, in such case, by proof that the contractor was induced to enter into the contract by the owner's false and fraudulent representations, respecting the subject of the contract. And even if the contractor, in case of such representations, instead of suing for the fraud and claiming damages therefor, has his election to waive the tort, and sue for the

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hands, belonging to the contractor, are insufficient for their payment, *see* 1 *E. D. Smith*, 626; 2 *Id.* 536, *and note; Id.* 644; *Nott's Lien Law*, 53 *to* 58; *and post*, "Costs."

value of his work and labor, the laborers and others employed by him, cannot make that election for him; they cannot waive the fraud practiced upon their employer, nor relieve the owner from liability for damages incurred by the fraud. *Id. ibid.* Nor can the owner be made liable to a sub-contractor, or other party dealing with the contractor, where unliquidated damages have accrued to the contractor by reason of the violation of the contract on the part of the owner; but the lien is restricted to the funds due or to grow due upon the contract. *Id. ibid.*, *and see* 4 *Hill*, 193; 7 *Id.* 525; 7 *How. Pr. R.* 352.

And so, where, in a proceeding by a sub-contractor, it appeared that the work and materials for which he claimed to recover, did not conform to the original contract; that the deviations therefrom were not authorized by the owners, nor, except in part, by their architects, and that the work, &c., had not been accepted by them,—it was held, that the owners were not liable. 2 *E. D. Smith*, 693. And Judge Brady, in that case, after stating the facts necessary to be established to enable a party to recover, remarks: "These are essential pre-requisites; and it would be unjust to a defendant owner to dispense with either, but more particularly to hold him responsible to the mechanic or material man, if the work done or materials furnished are not, and neither of them is, in conformity to the contract, and nothing, therefore, due to the contractor. It is true that this would seem to impose upon the persons named the duty of ascertaining that the materials or work were in conformity to the contract; but the law must make their lien, thus acquired by legislative enactment, subservient to the owner's right; between whom and them there is no privity of contract, and to whom they must be strangers." *Ib.* 695; *and see* 1 *Id.* 692.

If payments are made by the owner, in good faith, according to the terms of his contract, before the notice of lien is filed, they must be allowed to him in making up the aggregate which he is liable to pay. 1 *E. D. Smith*, 625; *Id.* 647; *Id.* 658; *Id.* 692. And, consequently, if there is nothing due to the contractor, upon his contract, the owner cannot be

made liable, whether the proceeding is instituted by the contractor, or a sub-contractor, (*a*). *Id. ibid., and Id.* 651; *Id.* 717; 3 *Kern.* 70; *s. c.* 2 *E. D. Smith*, 689. And where the proceedings were instituted at the request of the owner, who had promised to pay the demand on being furnished with an order from the contractor, which was done,—it was held that this, at most, was only an implied admission on the part of the owner, that there was something due on the contract, and that it did not preclude him from showing the truth to be otherwise. 1 *Sand. S. C. R.* 14.

But even though there is money due under the contract of the owner, which has not been paid to the contractor, yet if there are prior liens upon the property, the owner is entitled to have them taken into account in determining the extent of his liability. 1 *E. D. Smith*, 647; *Id.* 673. And if those liens exceed, in amount, the sum due to the contractor, it is a good defence to the proceeding. *Id.* 664. The owner, however, may be prosecuted in an ordinary action for a balance due to the contractor; and it is no defence to such action, that parties have acquired liens for labor performed and materials furnished by them at the request of the contractors. 2 *Duer*, 354.

Extent of the Lien.] The claimant's lien extends only to the right, title, and interest of the owner, in the house or building and appurtenances, erected, altered, or repaired, and the lot upon which the same stand, existing at the time the notice of lien was filed. *Laws of* 1851, *p.* 953, *sec.* 1. And it does not operate to create a personal liability against the owner, where he is not personally liable by contract to the

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(*a*) Whether the owner can avail himself of payments made before they become due according to the terms of the contract, where a sub-contractor is the plaintiff, and his lien is filed after such payments are made, though before they are due, *quære? See* 1 *E. D. Smith*, 741. He may, it seems, if the payments are made in good faith; though otherwise if they are made with intent thereby to defraud the sub-contractor, or other party, and defeat the beneficial design of the statute. 3 *Id.* 660; *and see* 1 *Id.* 742.

claimant. *See* 1 *E. D. Smith*, 626; *Id.* 662; 2 *Id.* 589; *Id.* 595; *Id.* 657; *Id.* 664.

It is not necessary that the owner should have title to the lot on which the building stands; but it is sufficient if he is the general owner of the building. The lien extends to his interest in the building, and in the land, if he has any. 21 *Barb.* 520.

Where materials are furnished for several buildings upon adjacent lots, under one contract for the construction of all, a single lien charging the whole debt upon all the buildings is proper. 6 *Abb. Pr. R.* 99.

Where the owner has transferred the property, and parted with the whole legal title, but has reserved in the deed an equitable interest, it is doubtful whether such interest could be secured under the statute. In construing the statute the terms, "right, title, and interest," it seems, must be taken to mean the legal right, title, and interest which the owner had at the time the notice of lien was filed. 2 *E. D. Smith*, 595; *Nott's Lien Law*, 111.

Nor does the lien operate to the prejudice of parties having prior liens and incumbrances upon the premises in question. The right, title, and interest of the owner is to be bound, but not to be enlarged, by the proceeding. *Ib.* 120; 1 *E. D. Smith*, 664; *Id.* 666; *Id.* 673.

How Lien Created.] The lien is created by filing with the county clerk of the city and county of New York, within six months after the performance of the labor, or the furnishing of the materials, the notice prescribed by the statute. *Laws of* 1851, *p.* 953, *secs.* 1 *and* 6.

In order to the acquisition of the lien, the statute must be strictly pursued. 2 *E. D. Smith*, 611; 3 *Id.* 632. Nor can the court in the subsequent proceedings to foreclose the lien, disregard or amend any defect in the notice to be filed, which is made by the statute a matter of substance. 1 *Id.* 654. "We cannot, by amendment," says Woodruff, J., "give the claimant a lien when the act has not been complied with,

any more than in a proceeding to foreclose a mortgage, we can (on discovering that the plaintiff has no mortgage), direct the defendant to execute and deliver one. *Ib.* 658.

Where it appears that the work was performed, or the materials furnished, more than six months before the notice is filed, no lien is obtained. 1 *Id.* 695. The filing of the notice *within* the six months after the performance of the work, &c., is one of the conditions to the creation of the lien. *Ib.* 3 *Id.* 622.

In respect to the time at which the six months commences to run, it has been doubted whether this period is to be computed from the time the party commences or concludes performing the labor or furnishing the materials. Mr. Nott, in his Treatise (*p.* 89 to 91), after considering the statutory provisions bearing upon the question, states it to be "the obvious intention of the act to allow a period, after the transactions between the parties have been concluded, in which the proceedings can be commenced." And see 1 *E. D. Smith*, 695; *Id.* 689; *Id.* 640.

Requisites of the Notice of Claim.] The statute requires the notice to be in writing, and to specify the amount of the claim, and the person against whom the claim is made, the name of the owner of the building, and the situation of the building, by its street and number, if the number be known. *Laws of* 1851, *p.* 954, *sec.* 6.

It is proper, also, to state in the notice the time when the labor was performed, or the materials furnished, so as to show that at the time the notice is filed, six months have not elapsed since the performance of the labor, or the furnishing of the materials. *See Nott's Lien Laws*, 11. Though it has been held not to be necessary for the notice to allege that the work was done within six months prior to the making of the notice. This "is matter of defence, and the defendant can be relieved even on motion from a lien which is filed after six months from the time of doing the work; or he may set it up as a defense at the trial." 3 *Abb. Pr. R.* 475, per Ingraham, F. J.; *s. c.* 3 *E. D. Smith*, 621.

The notice should also state the name of the claimant, and whether he is the contractor, or sub-contractor, or laborer, or person furnishing materials for the contractor. *Nott's Lien Law*, 10; and 1 *E. D. Smith*, 716; 3 *Id.* 621.

And it should also show, if the claimant is the contractor, that the labor was performed, or the materials furnished, by virtue of a contract with the owner or his agent; and if the claimant is a sub-contractor, or laborer, or person furnishing materials for the contractor, that the labor was performed or the materials furnished in pursuance of an agreement with such contractor, and in conformity with the terms of the owner's contract. *Id. ibid.* Where, however, the notice stated that the work was done by the claimants in pursuance of a contract made by the owner, but without any averment that they had made the contract; it was held that the notice was sufficient. 3 *Abb. Pr. R.* 475; *s. c.* 3 *E. D. Smith*, 621.

The notice should also show that the labor was performed or materials furnished, in building, or altering or repairing, the house or other building, or appurtenances to the house or other building; and that such house or other building or appurtenances, was situated in the city and county of New York. *Laws of* 1851, *p.* 953, *sec.* 1; 1 *E. D. Smith*, 688; *Nott's Lien Law*, 10. In respect, however, to the last requirement, in a case where the notice was addressed to the clerk of the city and county of New York, and the building was described in the notice as situated in 85th Street, between 4th and 5th Avenues, but without stating that it was in the city; it was held that it was a sufficient compliance with the statute to sustain a judgment. *Ib.*; and see 4 *Abb. Pr R.* 432.

In respect to the matters expressly required by the statute to be stated in the notice, the claimant, as we have seen, must specify the "amount of the claim" And the omission to state any sum so due to the claimant would no doubt render his proceedings to acquire a lien illegal and void. Care should also be taken by the claimant to state in the notice the whole amount due to him, as his subsequent recovery would be limited to the amount there claimed. 1 *E. D. Smith*, 671; *Nott's Lien Law*, 10.

The notice, also, by the statute, must specify "the person against whom the claim is made." If the claimant is the contractor, the owner is the person against whom the claim is made; and if the claimant is a sub-contractor, or other person than the contractor, the person against whom the claim is made is the contractor. If the notice claims that the work was done under an agreement with the contractor, the claimant cannot recover for work done for the owner. 1 *E. D. Smith*, 668.

The notice, also, by the terms of the statute, must specify "the name of the owner of the building." And this, like the other matters required by the statute to be stated, is a matter of substance—an essential pre-requisite to the creation of the lien; and where the notice neither contained the names of the defendants or owners, nor in any manner described or attempted to describe them as owners, it was held, in proceedings to foreclose, that the plaintiff had acquired no lien as against the defendants. 1 *E. D. Smith*, 654. And per Woodruff, J., after stating the several matters required by the statute to be specified in the notice: "These particulars are all material. They are matters of substance, and are wisely provided for, to enable the county clerk to make the proper docket; to give early notice to owners that their property is sought to be charged; and to protect third persons (purchasers or mortgagees), by apprising them of the alleged claim." (*a*) *Ib.* 656.

If the owners are a corporation, it should be named in the notice as owner; but if they are an unincorporated association, the individuals composing it should be named as defendants in the proceedings to foreclose, and the notice should describe them either by their associate or joint name, or otherwise, so that they can be identified. *Ib.*

Where the name of the owner is omitted in the notice, his appearance, in the proceedings to foreclose, is no waiver

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(*a*) And *quære*, whether any description of the owner which will identify him, other than his *name*, will be sufficient; and whether it is sufficient to give the name of one of several joint-owners. 1 *E. D. Smith*, 654.

of the defect; nor will the court in those proceedings amend or disregard the defect. *Ib.*

It is not necessary, however, where the contract is made with an *agent* of the owner, that the notice should state the name of the person with whom the contract was made; but it is sufficient in this respect if it state the name of the person against whom the claim is made, and the name of the owner of the building. 4 *Abb. Pr. R.* 472; *s. c.* 3 *E. D. Smith*, 666.

The statute further requires that the notice shall specify "the situation of the building, by its street and number, if the number be known." If the number of the building is not known, it will be necessary to describe the building briefly by its situation on the street, and the distance at which it commences from some other street or known boundary. Though a description by a general statement, that the premises are on the west side of a street, between two others, may be sufficient, if the number is unknown; but in such case the complaint, upon the foreclosure of the lien, should be made more definite, so that the sheriff, in case judgment should be rendered for the claimant, could determine, beyond doubt, the premises to be sold. 4 *Abb. Pr. R.* 432. If the number of the building is not stated, the reason or excuse for the omission should be stated in the notice. *Ib.; and see Nott's Lien Law*, 13.

Before filing the notice, it must be verified in the same manner as a pleading under the Code of Procedure. *Laws of* 1855, *p.* 764, *sec.* 7. And an affidavit subscribed to the notice, alleging that the statement of the balance due, as therein set forth, is true according to the deponent's knowledge, is not sufficient. 3 *E. D. Smith*, 662. Such defect is fatal to the whole proceeding, and cannot be amended. *Ib.* For form of notice, see *Appendix*, No. 141.

Duty of County Clerk.] The county clerk is required by the statute to enter the particulars of the notice of lien in a book to be kept in his office, to be called "The Lien Docket," and which docket shall be suitably ruled in columns headed

"Claimants;" "Against whom claimed;" "Owners;" "Building;" "Amount claimed;" "Date of Notice, hour, minute" (meaning the time when the notice is filed); and "What proceedings have been had." *Laws of* 1851, *p.* 953, *sec.* 6.

The names of owners, and persons against whom the claim is made, are to be inserted in alphabetical order. *Ib.*

At the time of filing the lien a fee of ten cents must be paid to the clerk. *Ib.*

Effect of the Lien.] The filing of the notice of lien will have the effect of a *lis pendens*, in respect to any subsequent change of interest in the property affected, and as to liens upon the property thereafter acquired. *See* 1 *E. D. Smith*, 679.

In respect to the effect of the lien upon the remedy of a party to whom the owner or contractor is indebted, it has been decided that the contractor may, notwithstanding he has acquired a lien, commence a distinct personal action against the owner for the price or value of the labor performed or the materials furnished. 2 *Id.* 541. And so the sub-contractor, or other party dealing with the contractor, may, in like manner, prosecute the contractor, after acquiring a lien against the owner. *Id.* 540. And he may do this, even though he has commenced proceedings to foreclose his lien against the owner, 1 *Id.* 670; though it would be otherwise in respect to the original contractor. 2 *Duer*, 612.

And where the contractor brings his action against the owner to recover a balance alleged to be due him upon a contract for the erection of a building, the defendant cannot set up as a defence to the action that mechanics and others, dealing with the contractor, have acquired liens upon the building for labor performed, or materials furnished, at the request of the contractor. *Id.* 354. The remedy of the defendant, in such case, is to institute a cross-action, making all the persons claiming liens parties thereto; or he may make a special application for leave to pay into court the amount due from him upon the contract, to abide a final decision upon the claims,

and for a stay of proceedings in the mean time. *Ib.* And the fact that there are claims under the lien law which have not been satisfied, or even established, can be no defence to an action for the recovery of the sum which the owner had covenanted to pay. *Ib.*

The payment by the owner of any valid lien, operates by virtue of the statute, as a payment to the contractor, of the amount of such lien. *Laws of* 1855, *p.* 761, *sec.* 4.

II. *Proceedings to Enforce or Foreclose a Lien.*

The proceeding to foreclose a lien, under the statute, is an equitable proceeding, in which the powers of the court, as a court of equity, are invoked to mould the remedy to suit the circumstances of each case. 1 *E. D. Smith*, 626; *Id.* 740. The proceeding is a proceeding *in rem*, and not *in personam;* and operates only as the foreclosure of a lien, and not as an action for the collection of a debt. *Id.* 662; 2 *Id.* 657; 3 *Id.* 637; *s. c.* 4 *Abb. Pr. R.* 205, 208. It is analogous to a proceeding for the foreclosure of a mortgage; and is governed by the same rules. *Id. ibid.*

How commenced.] The proceedings to foreclose a lien are commenced by the service of a notice upon the owner or his agent, requiring him to appear in the court having jurisdiction (to be specified in the notice), either in person or by attorney, at a time certain upon some day (also to be specified in the notice), not less than twenty days from the service thereof, and submit to an accounting and settlement in such court of the amount due or claimed to be due for the labor performed or the materials furnished. *Laws of* 1851, *p.* 953, *sec.* 4.

If the proceeding is instituted by a sub-contractor, or other person having a claim against a contractor with the owner, such contractor may be made a defendant with such owner; and in such case, the like notice of foreclosure should also be served upon him in the same manner as upon the owner. *Laws of* 1855, *p.* 761, *sec.* 5.

The notice is a substitute, in effect, for a summons in an ordinary action. 1 *Code R., N. S.* 230.

Against whom the proceeding to be instituted.] The proceeding must be instituted by the contractor, laborer, or person furnishing materials, against the *owner* of the building.

Where the plaintiff is a sub-contractor, or other person dealing with the contractor, he may, in his discretion, join such contractor with the owner as a party defendant in the proceedings. *Laws of* 1855, *p.* 761, *sec.* 5.

But the contractor cannot summon a sub-contractor, or other claimant who has acquired a lien for work or materials, to appear and account. 2 *E. D. Smith*, 571; *Id.* 654. The statute makes no provision for such a proceeding on the part of the contractor. It provides but two modes of enforcing the claim; one, by the claimant himself, under section four, against those who are to be affected by the foreclosure of the lien; the other by the owner, who, under the fourth subdivision of section eleven, may require the claimant to proceed within thirty days, or be barred of his lien. *Id. ibid; and see post*, "Parties to the proceeding."

Within what time the proceeding to be commenced.] The proceedings for the foreclosure of the lien must be commenced within one year from the time the notice of lien is filed, *Laws of* 1851, *p.* 953, *sec.* 12; unless the owner serves a notice upon the claimant requiring him to commence his action; in which case, it must be commenced within thirty days after the time specified in the notice. *Ib. sec.* 11, *sub.* 4; and see *post*, "Proceedings by owner to compel commencement of foreclosure." The claimant may instantly, however, on filing his lien, if he is in a position to demand relief, institute the proceedings for the foreclosure. *See* 1 *E. D. Smith*, 675; *Nott's Lien Law*, 91, 92.

The Courts having Jurisdiction.] The only courts having jurisdiction in the proceedings for the foreclosure of the lien, are the court of Common Pleas of the city and county of New

York, the Marine Court, and the District Courts of that city. *Laws of* 1851, *p.* 953, *sec.* 4.

Extent of their Jurisdiction.] The jurisdiction of the court of *Common Pleas* is general, under the provisions of the statute relating to these proceedings, as well as under the laws regulating their jurisdiction in other cases. It may, therefore, entertain jurisdiction in a proceeding to foreclose a lien, however large or small the claim of the plaintiff may be. 2 *E. D. Smith*, 639. The plaintiff simply runs the risk of paying his own costs, and the costs of the defendant, in case his recovery does not amount to fifty dollars. *Ib.; and Code of Pro.*, § 305.

The court of Common Pleas, also, has jurisdiction, by filing a complaint for that purpose, to enforce an equitable lien existing in favor of a party; although it cannot do so, by a decree made in proceedings instituted under the statute in question. 2 *E. D. Smith*, 594; *Id.* 616.

The jurisdiction of the *Marine Court*, under the statute, differs from that of the court of Common Pleas, in respect mainly to the amount of the plaintiff's claim. *Id.* 578; *Nott's Lien Law*, 76 *to* 79. By the act of 1851 (*p.* 953, *sec.* 4), its jurisdiction was limited to cases where the amount claimed did not exceed one hundred dollars; but the legislature, having extended its jurisdiction, generally, in actions, to claims amounting to five hundred dollars (*Laws of* 1852, *p.* 648; *Laws of* 1853, *p.* 1165), jurisdiction to the same amount is conferred upon it in the proceedings under the statute in question. *See Ib., and* 2 *E. D. Smith*, 609; *Id.* 626, 630; *and see, also*, 2 *Abb. Pr. R.* 219. In respect, however, to actions against the mayor and aldermen, &c., of the city of New York, its jurisdiction is limited to cases where the amount claimed does not exceed two hundred dollars. *Laws of* 1858, *p.* 569.

The marine court has no jurisdiction to enforce equitable liens; it has no equity jurisdiction except such as is given to it by the statute. But if a lien has been acquired under the statute, that court may order the premises to be applied to

the satisfaction of the lien. The statute, having conferred upon it jurisdiction in these proceedings, it is clothed with all the powers necessary to carry the provisions of the statute into full effect. 2 *Id.* 595, 608, per Woodruff, J. It possesses, therefore, the same power to require the contractor to be brought in as a party, as the court of Common Pleas. *Id.* 577; *s. c.* 1 *Abb. Pr. R.* 415.

In respect to the jurisdiction of the *District Courts*, it may be stated, generally, that they possess the same jurisdiction as the Marine Court, except so far as relates to the sum claimed, and the situation of the property; and except, also, that they have no jurisdiction in proceedings against the mayor and aldermen, &c., of the city of New York. *Laws of* 1858, p. 569.

By the statute of 1851 (*p.* 953, *sec.* 4) jurisdiction was given to those courts where the amount claimed did not exceed one hundred dollars. The act of 1857 (*a*) (*vol.* 1 *p.* 708; *Pub. Acts*, *p.* 211), extended their jurisdiction in actions, generally, to claims amounting to two hundred and fifty dollars or less; and that extended jurisdiction, no doubt, applies to claims arising under the provisions of this statute. *See* 2 *E. D. Smith*, 639; *Id.* 626, 630; *Nott's Lien Law*, 77; 2 *Abb. Pr. R.* 219.

In addition to the restriction of the jurisdiction of the district courts, above stated, the statute requires that the proceedings to foreclose the lien, must be instituted in the district court of the judicial district in which the building is situated. *Laws of* 1851, *p.* 954, *sec.* 4.

Requisites of Notice.] The notice, according to the provisions of the statute (*sec.* 4, *ante*), should require the defendant to appear in the proper court (to be specified in the notice), either in person or by attorney, at a time certain (meaning the hour of the day), upon some day to be specified in the notice, not less than twenty days from the service thereof,

(*a*) See this act, for the jurisdiction and practice and proceedings, generally, in actions commenced in the district courts.

and submit to an accounting and settlement in such court, of the amount due, or claimed to be due for the labor thus performed, or the materials thus furnished. For form, see *Appendix*, No. 142.

The notice should also contain a sufficient reference to the alleged lien, 1 *E. D. Smith*, 687; stating the amount of it, and when it was docketed. 1 *Code R., N. S.* 286. But the statute does not require that the time when the lien was docketed should be stated in the notice; and, it seems, it is sufficient if it appears on the trial that it was filed and docketed within six months after the performance of the labor. 1 *E. D. Smith*, 689, *supra*. It should also be stated that the labor had been performed or the materials furnished, though it need not state the time when this was done (*a*). *Ib.*

The notice should also require the owner to appear, either in person or by attorney, in the court in which the proceeding is instituted; and it would be irregular to summon him to appear before the clerk of the court. 7 *How. Pr. R.* 353. If the proceedings are pending in the court of Common Pleas, it should require him to appear at a special term of that court.

The name of the contractor should also, it seems, appear in the notice; though the defect would be waived if the owner appeared and proceeded with his defense without making objection. 1 *E. D. Smith*, 658. "The defendant," says Daly, J., in giving the opinion of the court, "by entering upon the subject-matter of his defence, waived any objection to the form of the notice to appear in court, served under § 4 of the act. He appeared and contested the claim, upon the ground that nothing was due by him to the contractor; and it does not lie with him now to object that he was not notified of the name of the contractor to whom the materials were furnished." *Ib.* 659.

(*a*) Whether the notice should also describe the building upon which the lien has been obtained, other than by a reference to the notice of lien on file with the clerk, *quære?* 1 *E. D. Smith*, 687.

Service of Notice.] The statute requires the notice to be served personally on the owner or his agent, at least twenty days before the time therein specified, in which the defendant is required to appear. *Laws of* 1851, *p.* 954, *sec.* 4. It should, in like manner, be served upon the contractor if he has been made a party to the proceedings. See *Laws of* 1855, *p.* 760, *sec.* 5.

The notice may be served by the plaintiff himself, or by the sheriff, or other person. *Sec.* 4, *supra.*

The statute does not specify the manner of service, except that it must be personal. In the absence of any more definite rule on the subject, the better course would be to serve the notice in the manner contemplated by Rule 18 of the Supreme Court, in respect to the service of a summons, &c.; which rule requires the party making the service, if made by any other person than the sheriff, to state in his affidavit of service, when, and at what particular place, he served the same, and that he knew the person served to be the person mentioned and described in the summons, as defendant therein, and also whether he left with the defendant such copy as well as delivered it to him. And see *Nott's Lien Law*, 23. For form of affidavit of service, see *Appendix*, No. 157.

Bill of particulars also to be served.] In addition to the notice required to be served on the defendant or owner, the statute requires that at the time of the service of such notice, or within fifteen days thereafter, a bill of particulars of the amount claimed to be due, shall be served personally on such owner or his legal representatives. *Laws of* 1851, *p.* 953. *sec.* 5. For form of bill of particulars, see *Appendix*, No. 143.

In drawing the bill of particulars, care must be taken to include all the items of the plaintiff's claim; as he will not be permitted to recover for any work, &c., not included in it. 3 *Abb. Pr. R.* 475; *s. c.* 3 *E. D. Smith*, 622.

Proceedings in case of Owner's default.] In case the owner, or other person notified, shall not appear at the time

and place specified in the notice served, and submit to an accounting in pursuance of the statute, and the proceedings are pending in the court of Common Pleas, on filing with the county clerk, an affidavit of the service of such notice, and of the default of the defendants to appear, the court will order a writ of inquiry to issue, or appoint a referee to assess the damages therein. And the subsequent proceedings are to be conducted as in other actions pending in that court. *Laws of* 1851, *p.* 953, *sec.* 7; *and Laws of* 1855, *p.* 760, *sec.* 6.

If the proceedings are pending in the Marine Court, or in a district court, a like affidavit of the service of the notice, and of the default of the defendants, must be filed with the clerk of the court; and the damages must thereupon be assessed by the court. *Id. ibid.; and see Laws of* 1852, *p.* 471.

In respect to the proceedings upon the execution of a writ of inquiry, the practice is stated by Mr. Nott, in his Treatise (*p.* 47), substantially thus: The times when the sheriff's jury sit can be ascertained from printed lists issued at the sheriff's office. The attorney for the plaintiff, before the time when it will be convenient to take the inquest, must deliver to the sheriff, the writ, order, &c. He should, also, before the inquest, have prepared an inquisition for the sheriff and jury to sign. The sheriff's fees are three dollars, and are to be paid at the time of commencing the inquest. After the inquisition is taken, it is to be signed by the sheriff and jury, and the sheriff must attach his seal. And the jury should find a verdict and sign their inquisition, before hearing any other case.

Upon the return of the writ of inquiry, or the report of the referee, or the assessment by the court, as the case may be, judgment is to be entered upon the same, and execution may issue for the enforcement of the claim so adjudicated and established, in the same manner as in cases upon other judgments in said courts. *Id. ibid.* For form, see *Appendix*, No. 148.

And if the contractor was joined with the owner as a defendant in the proceedings, the court upon his default may render judgment against him for the amount which shall be

found owing by him, in addition to the judgment provided for against the owner. *Laws of* 1855, *p.* 760, *sec.* 5.

Appearance by Owner, and Service of Bill of Particulars.] If the owner intends to appear in the action, which he may do either in person or by attorney, a notice of appearance should be given to the attorney for the plaintiff. The object of this is the mutual convenience of the attorneys, who will thus be enabled to send a stipulation and rule for pleading, and thereby save the trouble and delay of an unnecessary appearance at the special term. *See Nott's Lien Law*, 29.

If the owner has any demands which he desires to off-set against the plaintiff's claims, he is required to serve a bill of particulars of the same upon the plaintiff. The bill of particulars should contain all the items of the defendant's set-off; and items not contained in it would not probably be allowed to him. See 3 *Abb. Pr. R.* 475; *s. c.* 3 *E. D. Smith*, 622. In respect to the extent of the owner's right to set-off, see *post*, "What the owner may show in defence." For form, see *Appendix*, No. 144.

The service of the bill of particulars should be personal, the same as the service of the plaintiff's bill of particulars upon the owner; and should be made within fifteen days after the commencement of the proceedings against him. *Laws of* 1851, *p.* 953, *sec.* 5.

But the service of a bill of particulars upon the claimant is unnecessary, to entitle the owner to prove that the work was not done in accordance with the contract, or that the contract has not been performed; nor is it necessary that a bill of particulars should be served to entitle him to recoup his damages for imperfections in the work. 1 *E. D. Smith*, 697. It is only when a *set-off* is claimed that the defendant is required to serve a bill of particulars. *Ib.*

Appearance of Parties in Court.] The statute provides that on appearance of both parties in pursuance of the notice served by the claimant, issue shall be joined upon the claims made, and notice of set-off served, and the same may

be noticed for trial and put upon the calendar of said court by either party, and shall be governed, tried, and the judgment thereon enforced, in all respects in the same manner as upon issues joined and judgments rendered in all other civil actions for the recovery of moneys in said court. *Laws of* 1851, *p.* 953, *sec.* 8.

The above section contemplates an issue to be joined in open court. The practice, however, is, in the Court of Common Pleas, upon the appearance of the parties, and filing the notice to foreclose, and the bills of particulars (claimant's and owner's), to enter a rule requiring the plaintiff to file a complaint as in an ordinary action, and to serve a copy thereof, within ten days, upon the defendant; and that the defendant in like manner file his answer, and serve a copy thereof within twenty days after the service of the complaint. 1 *Code R., N. S.* 230; *Nott's Lien Law*, 31. For form, see *Appendix*, No. 145. The proceedings then assume in all respects the form of an ordinary civil action, and are in all things governed by the same rules as other civil actions brought for the enforcement of similar rights. *Id. ibid.;* and 1 *E. D. Smith*, 626; *Id.* 700.

If the suit is brought by a sub-contractor, or other party dealing with the contractor, and the owner desires the contractor to be brought in as a party to the proceedings, he may make the application for that purpose on the appearance of the parties in court, and without waiting until issue is joined. *Ib.* 699. "And this appears to me," says Woodruff, J., "to be the most convenient practice. The facts are then all before the court, which show the necessity of summoning the contractors. The notice of claim filed with the county clerk, the notice to the owner to appear and submit to an accounting, &c., by which the foreclosure is instituted, and the bill of particulars of the plaintiff's claim, and probably, also, the counter-claims set up by the defendant in *his* bill of particulars, all show what relation the contractors bear to the controversy, and that their presence is necessary." *Ib.* 712.

In the Marine and District Courts the parties appear on

the return day of the notice (which is treated like a summons), and the notice and bills of particulars of the parties are then filed. Issue is then joined as in ordinary actions. *Nott's Lien Law*, 78.

If the defendant desires the contractor to be made a party to the proceedings, the application for that purpose may be made on the appearance of the parties in court; and both the Marine and the District Courts have the same power to require the contractor to be brought in as a party, as the Court of Common Pleas. *Ib.*; 2 *E. D. Smith*, 577; *s. c.* 1 *Abb. Pr. R.* 415.

Pleadings.] The pleadings of the parties are not regulated by statute, nor by any express rule of the court. In practice, however, the rules prescribed by the Code of Procedure, in regard to the form of the pleading, determine the pleadings in these proceedings. 1 *E. D. Smith*, 626; *Nott's Lien Law*, 31; and see 3 *E. D. Smith*, 657; *Id.* 677; *Abb. Pl.* 362, 364, *and notes.*

1. *Complaint.* The complaint should allege every fact relating to the plaintiff's claim and lien, necessary to be established on the trial to entitle him to the relief sought. Thus, it should aver that the labor was performed and the materials furnished at or before the time when the notice of lien was filed, 2 *E. D. Smith*, 639; that such labor and materials were furnished in conformity with the contract between the owner and the original contractor, *Id.* 554; *Id.* 558; *s. cases*, 1 *Abb Pr. R.* 319; *Id.* 322; that the defendant is the owner of the building, 1 *E. D. Smith*, 722; that the owner or contractor, as the case may be, is indebted to the plaintiff, *Id.* 626; and generally, it should allege all the facts showing not only that the plaintiff has a valid claim for work performed and materials furnished, but also the facts showing that he has acquired a valid lien upon the premises of the defendant for the security of the same. See the cases *supra;* and see also, 1 *E. D. Smith*, 626; *Id.* 722; 2 *Id.* 639; *Id.* 556; *s. c.* 1 *Abb. Pr. R.* 321; 3 *E. D. Smith*, 677; *Id.* 657; *s. c.* 4 *Abb. Pr. R.* 432; and see *Abb. Pl. pp.* 362, 363,

and notes; Nott's Lien Law, 32, 33. For forms, see *Appendix*, Nos. 146, 147.

If the complaint is defective, it may be set aside on motion, for irregularity, 2 *E. D. Smith*, 556; *s. c.* 1 *Abb. Pr. R.* 321; or if the complaint does not definitely describe the premises, so as to enable the sheriff to determine without doubt the premises to be sold, the defendant may demur, 4 *Id.* 432; *s. c.* 3 *E. D. Smith*, 657; or when it does not appear how the labor or materials were furnished, the court may require it to be made more definite and certain. 1 *Abb. Pr. R.* 319; *s. c.* 2 *E. D. Smith*, 554.

2. *Other Pleadings.* The defendant may either answer or demur to the plaintiff's complaint. And the plaintiff may, in a proper case, reply to the answer. These pleadings are the same in form as the pleadings in ordinary actions under the Code of Procedure. See 1 *E. D. Smith*, 626, 649; 2 *Id.* 639; *Nott's Lien Law*, 33.

Parties to the Proceedings.] By the statute, the claimant and the contracting owner are the only *necessary* parties to the proceedings. 1 *E. D. Smith*, 713; *Id.* 719; 2 *Id.* 577, 582; *s. c.* 1 *Abb. Pr. R.* 415.

Other parties, however, may be brought in at the instance of either party. Thus, the plaintiff, who is a sub-contractor, or an employee or vendor of the contractor, may in the first instance make the contractor a party to his proceedings. And judgment may thereupon be rendered in the suit against the contractor for the amount found owing by him to the plaintiff, in addition to the judgment against the owner. *Laws of* 1855, *p.* 760, *sec.* 5. And as the plaintiff may, by making both the contractor and owner parties, secure a judgment against the former, though failing as against the latter, it will be found advisable, in most cases, to make the contractor one of the original parties to the proceedings. See 2 *E. D. Smith*, 693. Besides, it would seem to be necessary to have both the contractor and owner before the court in order to do justice. "The lien holder," says Woodruff, J., "may claim more than is due to him; and if so, the contractors

are interested, and are the *only* persons interested, to reduce it. The owner has no interest in that question. The owner may deny that he owes the contractors; and if so, the contractors have even a greater interest than the plaintiff in the determination of *that* question." * * * "The more my attention is given to this statute, the more I am satisfied that it cannot be rightly administered where the claim is by a sub-contractor or employee, or vendor of the contractors, but by regarding the foreclosure as *in the nature* of an interpleading suit in equity, in which the presence of all three parties is necessary in order to do complete justice." (*a*) 1 *E. D. Smith*, 710, 711; and see *Id.* 666; and see also, the observations in *Nott's Lien Law*, 124, 126. And it has been held, therefore, that the contractor may also be brought in as a party to the suit on the application of the defendant, where the plaintiff has not made him a party in the first instance. 1 *E. D. Smith*, 699; 2 *Id.* 577; *s. c.* 1 *Abb. Pr. R.* 415.

The plaintiff may also make prior lien holders parties to his proceedings, when he seeks to impeach the validity of their liens, or deny the amount thereof, or allege some higher equity. 1 *E. D. Smith*, 673; *Id.* 699; *Id.* 664. And he cannot contest a prior lien without becoming himself an actor, and instituting proceedings for that purpose. *Id. ibid.*

But prior lien holders will not be made parties on the application of the owner. *Id.* 704, 713. The owner is protected by the amount of such prior liens being allowed to him (as sums to be first paid out of the fund in his hands), before he can be required to pay anything to the subsequent claimant. If the plaintiff does not make the prior lien holders parties "he is to be taken to admit the validity and amount of the prior liens, and his own claim will be taken

(*a*) Whether the law would not be unconstitutional if its administration had not been committed to the court with power to make the contractors parties, as a law by which the contractors' property is taken from them without notice and without "due process of law, *quære?* 1 *E. D. Smith*, 699, 709, per Woodruff, J.; and see *Nott's Lien Law*, 124 to 126.

to be subordinate to them. And in the inquiry whether anything, and how much, is due from the *owner*, such prior liens must be taken into view as sums to be first paid out of the funds in his hands." *Ib.* per Woodruff, J.; and see *Id.* 672.

In respect to those who have acquired liens subsequently to the filing of the claimant's notice, it is unnecessary to make them parties to the proceeding. The notice filed by the plaintiff is to have the effect of a *lis pendens*, so far as respects any subsequent change of interest in the property, and as to subsequent liens. And if the subsequent lien holders desire to contest the validity of a prior lien, they must themselves, as we have seen, institute proceedings for that purpose. *See supra.*

The application to add other parties to the proceedings may be made on the appearance of the parties in court, pursuant to the notice to appear; or at any subsequent stage of the proceedings. 1 *E. D. Smith*, 719; *Id.* 699.

In respect to the manner in which parties shall be brought in, Woodruff, J., in the case last cited, says, "Upon this subject there can be no difficulty in following in substance the former equity practice. An order being made to add the contractors as parties, they can be summoned to answer the plaintiff's complaint with the other defendant already in court; and, on being served with the order, summons, and complaint, they would be clearly bound to do so, or they could never after complain of any judgment which might be rendered between the claimant and the owner." *Id.* 713; *and see Id.* 721.

The Marine Court and the District Courts possess the same power to require the contractor to be brought in as a party, as the Court of Common Pleas. 2 *Id.* 577; *s. c.* 1 *Abb. Pr. R.* 415. And those courts may make any order which is essential to carry into full execution the jurisdiction which the statute has conferred upon them by authorizing them to entertain these proceedings; and in this respect it is not material whether the foreclosure be deemed a strictly legal, or an equitable proceeding. *Ib.* per Woodruff, J.

Amendments; Waiver of Defects, &c.] The court has no power to allow an amendment of the notice of lien, with the view of remedying a material defect in it. 1 *E. D. Smith*, 654, 658. If the complaint, however, contains proper averments, the court will overlook immaterial errors, or sustain an imperfect notice, which was in substantial compliance with the statute. *Ib.; and see* 4 *Abb. Pr. R.* 432.

In respect, however, to proceedings to enforce or foreclose a lien, it seems the court will allow amendments to the same extent as in ordinary actions. *Id. ibid; Nott's Lien Law*, 44; 1 *E. D. Smith*, 639; *Id.* 719; 1 *Code R., N. S.* 285. And in the case of *The Empire Stone Dressing Co.* vs. *Pickering* (cited in *Nott's Lien Law*, 44), the plaintiff was permitted to amend his complaint, and a new trial was granted after the cause had once gone to trial and been submitted by the counsel. And the court was understood to say, in that case, that inasmuch as the pleadings in lien cases are required by the court, and not by the statute, the court will look upon them with greater leniency than upon ordinary pleadings, and will exercise with respect to amendments, a more liberal discretion.

And so, defects in the proceedings to foreclose a lien may be waived by the parties. Thus, where the notice of foreclosure omitted to state the name of the contractor, it is too late to make the objection after the defendant has entered upon his defence, and contested the claim on the ground that nothing is owing by him to the contractor. 1 *E. D. Smith*, 658, 659. And so, it seems, a general appearance by the defendant would waive a merely formal error in the notice. *Ib.* 657; *and see Id.* 722.

Notice of Trial, and other Proceedings.] Issue being joined between the parties, the cause is noticed for trial and placed upon the calendar by either party, the same as in ordinary actions. *Laws of* 1851, *p.* 953, *sec.* 8; *Code of Pro.* § 256. And the ordinary practice in respect to the other proceedings, before trial, such as the notice of inquest,

affidavit of merits, note of issue, and the like, is to be pursued. *Id. ibid.; and* 1 *Code R., N. S.* 230.

Trial and proceedings thereon.] The trial is conducted in the same manner, in all respects, as in ordinary actions. It is to be tried, however, by the court. In the Common Pleas the fourth Thursday is set apart for such cases. *Nott's Lien Law*, 220, *note.*

1. *What the claimant must show.* In respect to the proof required to be given by the claimant to establish his action, it may be stated generally, that he must prove the same facts which it would be necessary for him to prove to entitle him to recover in an ordinary action for work performed and materials furnished; and also the additional facts showing that he has acquired a valid lien upon the premises as against the owner.

The claimant must show the notice of lien, and that the same was properly filed. This is proved by a copy of the original lien, duly exemplified by the county clerk, and his certificate of the filing. The proceeding to foreclose a lien "is a proceeding *in rem;* and the very first step in the proceeding, when the parties are brought into court, is to establish a lien, for without that there is no foundation for the proceeding; there is no lien to foreclose; there is no claim in which the owner has any interest." 1 *E. D. Smith*, 663, per Woodruff, J.; and see *Nott's Lien Law*, 48, 49, 50.

The claimant must also show the time when the labor was performed, or the materials furnished, so that it may appear that at the time the notice of lien was filed, six months had not elapsed since the performance of the labor or the furnishing of the materials. 1 *E. D. Smith*, 687. "The time when the labor was performed," says Woodruff, J., "must appear on the trial; and it must appear then that the notice of claim was filed within six months next ensuing the performance, &c. And that was shown in this case by the appellant's admission that the work, &c., was done under the employment of a *contractor*, whose contract was made in August, and the notice of claim was shown to have been filed in

October." *Ib.* 689; *Id.* 695; *Nott's Lien Law*, 50; but see 3 *Abb. Pr. R.* 476, per Ingraham, F. J.

Where the work was performed or materials furnished in pursuance of a written contract with the owner or his agent, the claimant is required, also, by the statute, to produce such contract, or the best evidence thereof in his possession, the validity of which must be established on the trial. *Laws of* 1851, *p.* 953, *sec.* 2. And where the labor was performed or materials furnished without such written contract, the claimant must in like manner produce the best evidence in his possession, to establish the value of such labor or materials, and that the same were used by the owner or his agent, or the original contractor, in the erection, alteration, or repairing of the building in question. *Ib. sec.* 3.

The existence of a contract between the owner and contractor must be shown, whether the proceedings are instituted by a contractor or a sub-contractor, or employee or vendor of the contractor. 1 *E. D. Smith*, 722; 2 *Id.* 662. The contract, however, need not be express, *Id. and note;* though the mere implied contract, which may be inferred by the owner's suffering improvements to be made upon his premises, to pay what those improvements may be worth, with no stipulation or agreement as to their price or character, is not a sufficient contract to enable a material man or laborer employed by the contractor, to acquire a lien under the statute. *Ib.*

Where the lien is sought to be acquired for improvements upon the separate estate of a married woman, it seems the contract must be express, and in writing, and executed by both the husband and wife, and acknowledged by the latter upon a private examination, separate and apart from her husband. *Ib. note; Id.* 729. Though where a contract was made by a husband, as agent for his wife, and labor was performed and materials furnished under that contract, upon a building which was the separate property of the wife,—it was held that the labor thus performed, &c., might be the basis of an equitable claim against the property benefited, which the court would enforce under the statute. 4 *Abb. Pr. R.* 472; *s. c.* 3 *E. D. Smith*, 666; *and see* 21 *Barb.* 551; 22 *Id.* 371.

And not only must the claimant show a contract between the owner and contractor, but where the claimant is a sub-contractor, or other person dealing with the contractor, he must also show that the labor was performed and the materials furnished in conformity with the terms of that contract. 1 *E. D. Smith*, 627; *Id.* 668; *Id.* 722; *Id.* 725; *Id.* 728; 2 *Id.* 662.

It should also be shown that the defendant is the owner of the building upon which the lien is claimed; though in the Marine and District Courts, where the notice of lien is informally treated as the complaint, if there be in that an averment of ownership which is not denied by the defendant's answer, nor a recovery objected to for want of proof, the judgment will not be reversed, though no evidence of ownership was given on the trial. 1 *E. D. Smith*, 722; *Nott's Lien Law*, 50.

The claimant must show, also, before he can be entitled to recover, that a payment has become due under the contract with the owner. (*a*) 1 *E. D. Smith*, 717; *Id.* 726; *Id.* 668; *Id.* 728; *Id.* 740. And this proof must be given whether the proceeding is instituted by a contractor, or a sub-contractor, or other person dealing with the contractor. *Id. ibid.* "Is it necessary, then," says Ingraham, F. J., "that the sub-contractor or material man should show that a payment has become due upon the contract before he can recover against the owner? or is it sufficient to show merely the existence of a contract between the parties? If the action had been between the contractor and the owner upon the contract, the contractor, to make out a *prima facie* case against him, would be required to show the performance of work sufficient under the contract to entitle him to payment. The operation of the lien law is to transfer to the sub-con-

(*a*) Whether it is necessary that payments should be due under the contract to entitle the claimant to recover, where the owner himself commences proceedings by giving the notice prescribed by sub-division 4 of sec. 11 of the statute, requiring the claimant to foreclose, *quære?* *See* 1 *E. D. Smith*, 717; *Id.* 728; *Id.* 740.

tractor so much of the contractor's claim against the owner as would be sufficient to pay the debt of the contractor to his sub-contractor. It would be but reasonable to require the same amount of proof to recover against the owner for the same debt, whether the suit is brought by one or the other claimant. It is said that this would be requiring the plaintiff to prove a negative. This is not so. It is an affirmative proposition, that there was a contract, and also that a payment has become due upon it." 1 *E. D. Smith*, 684; *s. c.* 8 *How. Pr. R.* 209. The same learned judge also remarks in *Hauptman* v. *Halsey* (1 *E. D. Smith*, 669), that "it rests with the plaintiff to make out a case to show that he is entitled to recover against the owner. To do this he must show the work done under the contract, for the contractor, and the performance on the part of the contractor, so as to entitle the latter to a payment under it." And see *Id.* 722; *and* 12 *Wend.* 373.

But the claimant will not be required to prove that the contractor has not been paid; and when he shows work done under the contract, and all the days of payment past, the *onus* is upon the owner to prove actual payment to the contractor. "The plaintiff is not bound to *negative* a possible defence. It is enough that he shows a *prima facie* right to recover. The statute gives him the lien, and the right to institute proceedings to test its extent, and enforce it at any time after his work is done. If payment to the original contractor is a good defence to the owner, he must set up such payment in his answer." 1 *E. D. Smith*, 631, per Woodruff, J.; *and see* 1 *Hill*, 277, *aff.* 7 *Id.* 529.

Where the claimant took the note of the contractor for the amount of his claim, and afterwards endorsed and transferred it to a third person, who discounted it, and paid the amount of it to him; and the endorsee subsequently recovered a judgment upon the note against the contractor, upon which execution was issued and returned unsatisfied; it was held that the claimant could not recover without proof showing that he had, by payment to the endorsee or otherwise, become reinvested with the title to the debt. 2 *E. D. Smith*,

621. And the mere production of the note at the trial, with an offer to give it up to be canceled, is not sufficient. *Ib.*

2. *What may be shown in Defence.* The defences which the owner has to the plaintiff's claim, are in general the same in effect as those which he may avail himself of in an ordinary action commenced for the recovery of the value of the work performed, or the materials furnished.

Thus, he may introduce and prove any offsets which he may have to the plaintiff's claim. And where the proceeding is instituted by the contractor, he may avail himself of offsets arising out of other matters than those connected with the contract.(*a*) 8 *How. Pr. R.* 199; *s. c.* 1 *E. D. Smith*, 691.

But to entitle the owner to prove offsets claimed by him, he must have served upon the claimant a bill of particulars of the same; and without such service he would not be permitted to avail himself of them. *See* 3 *Abb. Pr. R.* 475; *s. c.* 3 *E. D. Smith*, 622; *Nott's Lien Law*, 28; and see *ante*, "Appearance by owner, and service of Bill of Particulars."

The owner may also show that the work was not done in conformity with the original contract, and that the contract has not been performed, 1 *E. D. Smith*, 697; 2 *Id.* 693; and also that the contractor abandoned the work before any payments became due. 2 *Id.* 560; *s. c.* 1 *Abb. Pr. R.* 360; *and see* 1 *E. D. Smith*, 692; *Id.* 717. And he may, also, recoup his damages for imperfections in the work. *Id.* 697; *Id.* 739.

The owner is also entitled to show as a defence to the proceeding, that there are liens upon the premises prior to that of the plaintiff, exceeding in amount the sum due from the owner.(*b*)

(*a*) Whether the owner may set off demands he has against the contractor not arising out of the contract, when the action is between the owner and a sub-contractor, or employee or vendor of the contractor, *quære? See* 4 *Hill*, 193; *s. c. in error*, 7 *Id.* 525; 1 *E. D. Smith*, 741; *Id.* 692; *Nott's Lien Law*, 128.

(*b*) But the owner would not be permitted, in an ordinary action, commenced by the contractor to recover the amount due upon the contract, to show, in bar of the action, that mechanics and others had filed notices of claims

Id. 647; *Id.* 664; *Id.* 666. And if such prior liens are less in amount than the sum due from the owner, he is also entitled to have the amount of the same allowed to him (as sums to be first paid out of the fund in his hands), before he can be required to pay anything to the plaintiff. *Id. ibid; Id.* 673; *Id.* 704. And the plaintiff will not be permitted to contest the validity or amount of prior liens upon the premises, unless he has made the persons holding the same parties to the action. *Id. ibid.*

It is a defence, also, to the claimant's proceedings, that there was nothing due from the owner to the contractor at the time the notice of claim was filed. 1 *E. D. Smith*, 647; 1 *Sand. S. C. R.* 14. And payments made by the owner in good faith, before the notice of claim was filed, are also to be allowed to him. *Id. ibid; and see* 1 *E. D. Smith*, 718; *Id.* 739. And so of credits given by the owner to the contractor, in pursuance of a mutual understanding between them, where the credit was given in good faith, and before the notice of claim was filed. *Id.* 692.

And the owner may, also, show in bar of the plaintiff's claim that a judgment of nonsuit, or judgment dismissing the plaintiff's proceedings, or other judgment, has been rendered against the plaintiff in a former proceeding to enforce the same lien. 8 *How. Pr. R.* 207; *s. c.* 1 *E. D. Smith*, 682; *Laws of* 1851, *p.* 953, *sec.* 9. He may show also that the plaintiff has not acquired a valid lien upon the premises: *e. g.*, that the notice of lien was filed after six months from the performance. 3 *E. D. Smith*, 622; *s. c.* 3 *Abb. Pr. R.* 475.

And if the claimant has made the contractor a party defendant, the latter may set up a counter-claim against the plaintiff, and recover judgment for an excess. 6 *Abb. Pr. R.* 306. And in such case he may avail himself generally of

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for labor performed and materials furnished at the request of the contractor. 2 *Duer*, 354. The remedy of the owner, in such case, is to institute a cross-action, making the persons claiming liens parties thereto; or by a special application for leave to pay the amount due from him into court, to abide a final decision upon the claims, and for a stay of proceedings in the mean time. *Ib.*

the same defences which would be available to him if he were sued for the same matter in an ordinary action. *Ib.*

Witnesses, &c.] The rules of the Code of Procedure in respect to witnesses, their competency and examination, and the examination of parties, apply to these proceedings.

Where the proceeding is instituted against the owner by a person furnishing materials under an agreement with the contractor, the latter, though a party defendant, is a competent witness for the plaintiff. His interest, under such circumstances, is balanced between the claimant and the owner. 2 *E. D. Smith*, 590; *s. c.* 2 *Abb. Pr. R.* 106.

Judgment.] The statute, as we have seen, authorizes a lien to be created in favor of a contractor, or party dealing with the contractor, upon the house or building, and appurtenances, and upon the lot of land upon which the same stand, to the extent of the right, title, and interest, of the owner, existing at the time the notice of claim was filed. *Laws of* 1851, *p.* 953, *sec.* 1. And by subsequent sections of the statute, in case the party acquiring the lien, proceeds to enforce it, and in such proceedings establishes his claim, judgment shall thereupon be entered in his favor, with the costs of the proceedings. *Ib. secs.* 7, 8, 9, 10.

In addition to the above statutory provisions, it is provided by the act of 1855 (*p.* 760, *sec.* 1), that whenever judgment is rendered in favor of the claimant, such judgment shall direct the sale of the interest of the owner in the land and premises upon which the lien exists, to the extent of the right of such owner at the time of the filing of the notice of lien, in pursuance of the statute; and that the proceeds of such sale shall be applied to the payment of the costs of the proceeding, and of the amount found to be due to such claimant; and that the residue of such proceeds be paid to the clerk of the city and county of New York, to abide the further order of the court.

And when the proceeding is instituted by a sub-contractor, or employee, or vendor of the contractor, and the con-

tractor is made a party to the proceedings, judgment may also be rendered against the contractor for the amount which shall be found owing by him, in addition to the judgment against the owner; and the court may award costs against such of the parties as shall be just. *Laws of* 1855, *p.* 760, *sec.* 5; 6 *Abb. Pr. R.* 306.

The proceeding to enforce or foreclose a lien, is a proceeding *in rem*, and not *in personam*. Its primary object is the foreclosure of a lien, as such. 1 *E. D. Smith*, 626; *Id.* 661; *Id.* 740; 2 *Id.* 596; 3 *Id.* 637, 642; *s. c.* 4 *Abb. Pr. R.* 205; *Ib.* 208, *note*. And in administering the statute, the court acts as a court of equity, and can adapt the judgment or decree to the special circumstances of the case. *Id. ibid.*

Where both the contractor and owner are joined as defendants, judgment may be awarded against the former, though the plaintiff may fail as to the latter; so held where the plaintiff, who was an employee and vendor of the contractor, performed labor and furnished materials, in pursuance of his agreement with the contractor, but which were not in conformity with the contract with the owner. 2 *E. D. Smith*, 693. And judgment, in that case, was awarded in favor of the owners for their costs of suit, and in favor of the plaintiff, against the contractor, for the amount claimed, with interest. *Ib.; and see* 6 *Abb. Pr. R.* 306.

The judgment must be special, whether the claim arises upon a contract between the owner and the contractor, or between the latter and a sub-contractor or other party dealing with the contractor. And no judgment can be awarded against the owner personally, where he is not personally liable by contract to the plaintiff. 2 *E. D. Smith*, 595; *Id.* 664; 6 *Abb. Pr. R.* 306. And therefore a personal judgment cannot be obtained against him where the proceeding is instituted by a sub-contractor, or other person dealing with the contractor. (*a*) *Id. ibid.* The judgment against the owner

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(*a*) If a personal judgment is entered against the owner, it will be reversed on appeal. Such error, however, applies to the *form* of the judgment, and

is a judgment against his right, title, and interest, in the premises, at the time the notice of claim was filed; though if he is personally liable to the plaintiff for the debt, a decree over against him may be made to cover a deficiency, in case there should be any. *Id. ibid; and see Id.* 657.

The proceeding to enforce a lien, being analogous to a proceeding to foreclose a mortgage, the judgment, in form, should direct a sale of the owner's interest in the specific premises upon which the lien exists, to the extent of his right, title, and interest, at the time the notice of lien was filed, and should provide that the proceeds be applied to the payment of the costs, and the amount found due, with interest; that the residue of such proceeds, if any, be paid to the county clerk, to abide the further order of the court; and that in case of a deficiency, if the owner is personally liable for the claim, the sheriff certify the amount in his report of sale; and that the claimant have execution therefor. 2 *E. D. Smith*, 657; *and see Id.* 664; *Id.* 673; 4 *Abb. Pr. R.* 205, 208, *note;* 2 *Duer*, 613; *Laws of* 1855, *p.* 760, *sec.* 1.

And if the claim is in favor of a sub-contractor, or other party dealing with the contractor, and the contractor is a party to the action, the judgment should direct a sale of the right, title, and interest of the owner in the premises on the day the lien was filed, and that the proceeds to the extent of the lien, or the amount due from the owner, be applied to the satisfaction of the plaintiff's claim, and costs, and if there is a deficiency, that the plaintiff have execution against the contractor for the same. *See Id. ibid.;* 2 *E. D. Smith*, 644; *and see* 6 *Abb. Pr. R.* 306.

Where the owner deposits a sum of money equal to the amount claimed, with the clerk of the county, under the eleventh section of the statute (*post*), it seems a judgment in the usual form, directing a sale of the owner's interest in the property, would be erroneous. 2 *E. D. Smith*, 539. And whether, in such case, the judgment should be against the

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may be remedied, by the entry of a proper judgment, where it appears the claimant is entitled to it. 2 *E. D. Smith*, 664; *Id.* 539.

owner personally, or whether it should direct only that the money thus deposited be paid to the plaintiff, was not determined by the court. *Ib.*

The plaintiff's judgment will be limited to the amount claimed by him in his notice of lien, with interest and costs. 1 *E. D. Smith*, 671.

Effect of Judgment.] If judgment is obtained by the claimant against the owner, and is paid by the latter, such payment will operate, under the statute, as a payment to the amount thereof, to the contractor. *Laws of* 1855, *p.* 760, *sec.* 4. And if a sale of the owner's interest in the premises takes place under the judgment, the whole of such interest will pass thereby, without any right of redemption to such owner. 4 *Abb. Pr. R.* 205; *s. c.* 3 *E. D. Smith*, 642.

If judgment, however, is rendered against the claimant, the effect of it will be, to discharge the lien; and this will be so whether the judgment is a judgment of nonsuit, or dismissal of the plaintiff's proceedings, or other judgment. 1 *Id.* 682; *s. c.* 8 *How. Pr. R.* 207. The failure, however, to recover against the owner, will not deprive the claimant of his demand against the contractor. *Ib.*

Transcript of Judgment.] The statute provides that a transcript of every judgment rendered, headed "Lien Docket," shall be furnished by the clerk of the court, or the justice, to the successful party, who may file the same with the county clerk, whose duty it shall be to enter the name of the court and the amount of the judgment, or where judgment is against the claimant, the word "discharged" under the last head in his docket. *Laws of* 1851, *p.* 953, *sec.* 9.

The transcript and docket should be special, showing that the judgment directed the sale of the owner's interest in the premises, existing at the time the notice of lien was filed, &c. 2 *E. D. Smith*, 673.

Execution.] The statute provides, in effect, that execution may issue to enforce the judgment, in the same manner as

upon judgments in ordinary actions (*a*). *Laws of* 1851, *p.* 955, *secs.* 7 *and* 8.

It is settled, however, that the execution, like the judgment, must be special, and must direct the sale of the owner's interest in the land and premises upon which the lien exists, at the time the notice of lien was filed; and that the proceeds of the sale be applied to the payment of the amount found to be due to the claimant, with interest, and of the costs of the proceedings, and that the residue of such proceeds, if any, be paid to the clerk of the county, to abide the further order of the court, and that in case of a deficiency, the sheriff certify the amount in his report of sale. 2 *E. D. Smith*, 673; 1 *Id.* 626; and see *ante*, p. 234, "Judgment."

And it would be irregular for the execution to direct the sale of the *property*, instead of the *owner's interest* therein. *Id. ibid.; and* 4 *Abb. Pr. R.* 205, 208, *note; s. c.* 3 *E. D. Smith*, 637.

If the judgment is rendered by the Marine Court, or by a district court, a transcript of such judgment should be obtained, and filed with the county clerk, who will thereupon issue an execution, for the enforcement of the same. *Laws of* 1851, *p.* 955, *secs.* 7, 8, 9; *and see* 2 *E. D. Smith*, 673; *Code of Pro.* §§ 68, 63, 64, *sub.* 13.

Sale of the Premises, &c.] The sheriff is only authorized to sell the owner's interest in the premises; and where he sold the *property described*, and not the *owner's interest*, a resale of the premises was ordered. 4 *Abb. Pr. R.* 208, *note; and see Ib.* 205; *s. c.* 3 *E. D. Smith*, 637, 642.

In all sales under judgments in these proceedings, the interest of the owner is to be sold subject to any prior lien existing thereon, unless the claimants under such liens are made parties tothe proceedings; in which case the court must

(*a*) Whether under the legislative interpretation of the lien law, contained in the act of 1855 (*p.* 760), the judgment directing the sale of the owner's interest is not of itself a sufficient warrant for the sale, without the necessity of issuing an execution, when no costs or other moneys are due from the defendant personally, *quære?* 3 *E. D. Smith*, 637; *s. c.* 4 *Abb. Pr. R.* 205.

settle the rights of the claimants. *Laws of* 1855, *p.* 761, *sec.* 4.

But it is not necessary to sell subject to mortgages, or other incumbrances. 3 *E. D. Smith*, 642, *supra.*

Redemption from Sale on Execution.] The owner has no right of redemption from the sale under the execution in these proceedings; and the provisions of the Revised Statutes (2 *R. S.* 370), allowing the redemption of real estate sold on execution, do not apply to sales under this statute. 4 *Abb. Pr. R.* 205; *s. c.* 3 *E. D. Smith*, 637; *Id.* 642.

The sale of the premises on the foreclosure of the lien, is an absolute sale, as in case of the foreclosure of a mortgage, of all the interest of the owner. *Id. ibid.*

Application for Moneys deposited with the Clerk.] The statute having directed the residue of the proceeds of the sale of the premises under a judgment in these proceedings to be paid to the clerk of the city and county of New York, to abide the further order of the court, the owner may apply to the Court of Common Pleas for an order directing the clerk to pay to him the proceeds of such sale, so paid to the said clerk, upon producing the certificate of such clerk that there are no liens docketed in his office against or affecting the said premises which have been filed under the statute. *Laws of* 1855, *p.* 760, *secs.* 1, 2.

And if it appears there are other liens on file with such clerk, affecting the premises, notice of such application shall be given to the claimants respectively, filing the notices creating such liens; and thereupon the said court shall distribute such proceeds among the parties entitled thereto, according to their respective rights and priorities, and may order a reference to take proofs in relation to such rights and priorities. *Ib. sec.* 3; *and see Nott's Lien Law*, 72.

Costs.] The statute directs costs to be allowed in these proceedings, upon the same principles, and by the same rules

as they are now allowed by statute in civil actions for the recovery of money; and they are to form a part of the judgment recovered in the same. *Laws of* 1851, *p.* 953, *sec.* 10.

The costs are not recoverable until the service of the notice to foreclose the lien, 1 *Code R., N. S.* 230; and when allowed, are the same as in an ordinary action, in which judgment upon failure to answer, can only be taken on application to the court. In reference to costs in ordinary actions, *see Code of Pro.* §§ 304 *to* 309. (*a*)

An extra allowance will not be granted in these proceedings, where the plaintiff's damages have been assessed by a sheriff's jury after the defendant's default. Such assessment is not a "trial," within the meaning of § 308, of the Code. (*b*) 4 *Abb. Pr. R.* 262; *s. c.* 3 *E. D. Smith*, 648. Nor do the proceedings to foreclose a lien under the statute constitute an action "for the foreclosure of a mortgage," or "proceedings to compel the determination of claims to real property," within the meaning of that section. *Id. ibid.*

In respect to motions in these proceedings, the costs are allowed, in the discretion of the court or judge, the same as in actions. *See Voorhies' Code of Procedure, sec.* 315, *and note.* Where the owner moves to bring the contractor in as a party to the proceedings, it seems that in granting the order the court will not charge the plaintiff with costs. 1 *E. D. Smith*, 719.

If the owner and contractor are both made defendants, the court may award costs against such of the parties as shall be just. *Laws of* 1855, *p.* 760, *sec.* 5.

And the owner, it seems, where the proceeding is instituted by a sub-contractor, or other party dealing with the contractor, will not be compelled to pay costs, when it appears that the whole sum due from him to the contractor, is insuffi-

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(*a*) See, however, in respect to costs in the Marine Court, and the District Courts, *Laws of* 1853, *p.* 1165; *Laws of* 1857, *vol.* 1, *p.* 724, *secs.* 67, *&c.; Pub. Acts, p.* 227.

(*b*) But under the recent amendment of § 308, the power to grant an extra allowance where "a trial has been had," in an action "for the recovery of money," is abolished. *Laws of* 1847, *vol.* ii. *p.* 558.

cient for that purpose; though it might be otherwise, in respect to costs made or incurred in consequence of improper litigation produced by the owner himself. *See* 1 *E. D. Smith*, 626; 2 *Id.* 536, *and note; Id.* 644; *but see Nott's Lien Law*, 53 *to* 58. "The court have repeatedly intimated," says the learned reporter to 2 *E. D. Smith R.* (*p.* 536, *note*, *supra*), "that this proceeding is an equitable proceeding, and to be so treated, and that where the words 'other civil actions for the recovery of moneys,' are used in the statute, like actions, or actions for the recovery of moneys secured in a similar manner, are intended; and if so, it would seem that section ten of the act, which subjects the allowance of costs to 'the same rules,' and makes them depend upon 'the same principles,' leaves the costs to be disposed of according to the same discretion and control, in respect to the party who shall be charged with the payment, and in limiting the recovery thereof from the owner to the amount of the fund in his hands, and in adjusting the matter, as between the owner and the contractor, when the latter is made a party, and the like, as in other equitable actions for the recovery of moneys, foreclosures, &c., addressed to the court as a court of equity. As in the case of a foreclosure against a purchaser, subject to a mortgage, if the property will not produce an amount sufficient to pay the mortgage debt and costs, the plaintiff recovers no costs from the *defendant*, unless they are imposed by the court as a penalty for his groundless litigation, and yet the plaintiff takes a judgment or decree against the property for his debt and costs."

Where the owner, after the notice of claim was filed by the sub-contractor, retained the amount claimed, and on proceedings to foreclose the lien, interposed no obstacle to its collection, and suffered a default to be taken against him; but the contractor, on the return-day of the notice, having been made a party to the proceedings, at his own request, whereupon a protracted litigation ensued between the claimant and the contractor,—it was held that the owner should not be charged with the costs of the litigation between the claimant and the

contractor, to determine in effect the right as between them to the money held by the owner. 2 *E. D. Smith*, 644. And the owner's omission to pay the money into court, or to the county clerk, in discharge of the lien, will not operate in such case to charge him with the costs of the litigation. *Ib.* But the amount of the claim, with costs against the owner, as upon failure to answer, are chargeable against the property, and should be decreed to constitute a specific lien thereon. *Ib.*

And the payment of the claim to the county clerk, under the eleventh section of the statute (*post*), does not necessarily relieve the owner from liability for the costs of the proceeding; so held, where the owner, in proceedings against him by a sub-contractor, after the service upon him of the notice to foreclose the lien, made such payment, and failed to appear on the day designated in the notice, whereupon the plaintiff issued a writ of inquiry, and entered judgment on the return thereof, against the owner for the amount of his claim and costs. *Id.* 536.

Appeals.] An appeal may be taken from the order or judgment of the court in these proceedings in the same cases, and with like effect, as in ordinary actions; and is to be governed by the rules and regulations applicable to appeals in such actions. *See Laws of* 1851, *p.* 953, *sec.* 8.

III. *Miscellaneous Proceedings.*

Proceedings by Owner to compel Commencement of Foreclosure.] The statute in effect authorizes the owner to serve upon the claimant a notice requiring him to commence an action for the enforcement of his lien, on or before a certain hour or day to be specified in such notice; and the lapse of thirty days thereafter, without any affidavit from the claimant being filed of the service of the notice commencing such foreclosure, will, upon filing with the clerk an affidavit of the service of the notice to commence the action and of the omission of the claimant to file an affidavit of the service of

the notice commencing the same, discharge the lien. (*a*) *Laws of* 1851, *p.* 953, *sec.* 11, *sub.* 4.

Whether the hour or day specified should be at least thirty days in advance of the service of the notice, or whether it may be at any time subsequent to such service, and the terms "thirty days thereafter," apply to the time thus specified, is not clear from the statute. Mr. Nott, in his Treatise (*pp.* 25, 27), assumes that the latter is the proper construction, and such seems to be the literal meaning of the section; though the former construction would be the fairest towards the claimant, while the effect upon the owner would be the same in either case. Mr. Nott, also intimates (*p.* 27), that the words, "on or before a certain hour," refer to some hour of the day of the date and service of the notice; but a more liberal and convenient construction would be to apply that language not only to the day of the date and service of the notice, but to any subsequent day which the owner might designate; and there is nothing in the language of the section forbidding such a construction.

The effect of notice by the owner requiring the claimant to foreclose his lien upon the rights of the claimant, where his claim is not yet due, has not been determined by the court. *See* 1 *E. D. Smith*, 717; *Id.* 728; *Id.* 740, 745; *and see Nott's Lien Law*, 25, 93, 94. For form of notice and affidavit of service, see *Appendix*, Nos. 149, 150.

How long Lien to Continue.] It is provided by the statute that every lien created under the first section of the act shall continue until the expiration of one year from the creation thereof, and until judgment rendered in any proceedings for the enforcement thereof. *Laws of* 1851, *p.* 953, *sec.* 11,

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(*a*) Whether the contractor, where payments due to him are stopped by the claimant's proceedings to obtain a lien, may not require the owner to give the claimant notice to commence the foreclosure of his lien,—*quære?* 2 *E. D. Smith*, 571; *Id.* 656, *and note.* If, in such case, the claim is unjust, and is not enforced under the statute, the contractor, it seems, may, at any rate, invoke the equitable jurisdiction of the court to compel an inquiry into its validity and amount. *Id. ibid.*

sub. 3, *and sec.* 12; *and see* 1 *E. D. Smith*, 740; 6 *Abb. Pr. R.* 99; *and post*, "How lien Discharged."

Order in which Liens are to be Paid.] The liens are to be paid according to the priority of notice filed with the county clerk. 1 *E. D. Smith*, 672; *and see Id.* 664; *Id.* 666; *Id.* 699. And where the claimant desires to contest a prior lien, either by denying its validity or amount, or averring that although it be first in time, it is subordinate in equity, he must do so by becoming himself an actor and instituting proceedings against the lien holder for that purpose. *Id. ibid.*

How Lien Discharged.] The lien may be discharged as follows:

1. By filing a certificate of the claimant or his successors in interest, acknowledged or proved in the same manner as the satisfaction of a mortgage, stating that the lien is discharged (3 *E. D. Smith*, 633); or,

2. By the deposit with the clerk of a sum of money equal to the amount claimed, which money shall thereupon be held subject to the lien; or,

3. By an entry of the clerk made in the book of liens, after one year has elapsed since the filing of the claim, stating that no notice has been given to him of legal steps to enforce the lien (6 *Abb. Pr. R.* 99); or,

4. By an affidavit of service of a notice from the owner to the claimant, requiring him to commence an action for the enforcement of his lien, on or before a certain hour or day specified in said notice, and the lapse of thirty days thereafter, without any affidavit from the claimant being filed of the service of the notice required in section four.

5. By satisfaction of the lien, upon an action for the enforcement thereof. *Laws of* 1851, *p.* 953, *sec.* 11.

The lien will also be discharged by a judgment of nonsuit, or other judgment against the claimant, in proceedings commenced by him to enforce the lien, 1 *E. D. Smith*, 682; *s. c.* 8 *How. Pr. R.* 207; and it is the duty of the clerk of the county, in such case, to enter the word "discharged,"

under the last head in his docket. *Laws of* 1851, *p.* 953, *sec.* 9.

But the omission to notify the county clerk, within a year of the filing of the claim, that legal steps have been taken to enforce the lien, does not operate to discharge it. The lien is discharged by the act of the clerk in making an entry in the book of liens, stating that no such notice has been given; and it is not discharged merely by the omission to give such notice to the clerk. 6 *Abb. Pr. R.* 99. To entitle the owner to have the lien discharged, he must make and file with the clerk an affidavit that he has had no notice within the year, of proceedings to enforce the lien. *Ib.*

Effect of paying Money to the Clerk to discharge Lien.] The effect of depositing with the clerk a sum of money equal to the amount claimed, is simply to reclaim the land from the lien. The right to the money remains still to be determined; and to recover it, the plaintiff must prosecute his action before the court. 2 *E. D. Smith*, 535. "The payment of the money to the county clerk by the owner," says Ingraham, F. J., "has no other effect than to reclaim the land from the plaintiff's lien, and to substitute in its place the money so paid. The right to the possession of the money still remains to be disposed of; and to recover it, the plaintiff must still prosecute his claim before the court. If he fails in establishing his claim, the defendant would be entitled to a return of the money from the clerk." *Ib.* 538; *and see Id.* 652, per Woodruff, J.

SECTION II.

LIEN LAW RELATING TO ALL THE COUNTIES OF THE STATE, EXCEPT THE COUNTIES OF NEW YORK AND ERIE.

The statute here considered was passed on the 17th of April, 1854 (*Laws of* 1854, *p.* 1086), and applied only to the counties of Westchester, Oneida, Cortlandt, Broome, Putnam, Rockland, Orleans, Niagara, Livingston, Otsego, Lewis, Orange, and Dutchess. By the act of April 14, 1858 (*Laws of* 1858, *p.* 324), the provisions of that statute were extended to all the counties of the State, except the city and county of New York, and the county of Erie.

The effect of the act of 1858 upon most of the counties of the State, and upon the cities of the State, other than the cities of New York and Buffalo, and the cities included within the counties above named, is important, as it substitutes the act of 1854 for other statutes already in operation in the counties and cities referred to; and in respect to other counties, it gives a lien law where none before existed.

Thus, by the act of 1844 (*chap.* 305, *p.* 451), a lien law was established for the several cities of the State (except the city of New York), and which also included certain villages therein named; by the acts of 1846 (*chap.* 184, *p.* 206; *amended by Laws of* 1850, *p.* 326), a lien law was passed for the county of Richmond; by the act of 1851 (*chap.* 169, *p.* 319), a like law was passed for the counties of Ulster, Westchester, and Putnam, and which was afterwards extended to the county of Rensselaer (*Laws of* 1852, *p.* 129); but the last three counties were subsequently brought within the provisions of other statutes (*Laws of* 1852, *p.* 611, *and Laws of* 1854, *supra*); by the act of 1852 (*chap.* 384, *p.* 611; *amended*, *Laws of* 1853, *p.* 809), a like statute was passed for the counties of Chemung and Rensselaer, and also for the counties of Westchester, Putnam, Dutchess and Rockland,

and the town of Newburgh (county of Orange); but the town of Newburgh and the four last-named counties were afterwards brought under the act of 1854; and by the act of 1853 (*chap.* 335, *p.* 708), a like lien law was passed for the county of Kings.

But by the acts of 1854 and 1858, the laws relating to the cities and counties, &c., above mentioned, except so far as they relate to the city of Buffalo (*a*), are repealed, and those statutes are substituted for them; and thus, a general lien law is established for all the counties of the State, except the city and county of New York (which, as we have seen, is already provided with a similar law), and except the county of Erie.

I. *Proceedings to Create a Lien.*

In what cases a Lien may be created.] The statute provides in effect, that *any person* who shall perform *any labor* in *erecting*, *altering*, or *repairing* any house, building, or appurtenances to any house or building, in any of the counties of this State, except the counties of New York and Erie; and *every resident* of either of those counties, except as aforesaid, who shall furnish *any materials* therefor,—shall, on filing with the town clerk of the town in which the property is situated, the notice prescribed by the statute, have a lien for the value of such labor and materials, upon such house or building and appurtenances, and upon the lot, parcel, or farm of land upon which the same shall stand, to the extent of the right, title, and interest of the owner of the property existing at the time of filing the said notice. *Laws of* 1854, *p.* 1086, *sec.* 1; *Laws of* 1858, *p.* 324.

In respect to the cases generally in which a lien may be acquired, see the New-York law, *ante*, *p.* 198, under the same

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(*a*) See the law now applicable to the city of Buffalo,—*Laws of* 1844, *chap.* 305, *in* 2 *R. S.* 4*th ed.* 740; *Laws of* 1851, *p.* 745; and see *Nott's Lien Law* 157. 214.

head, which is no doubt applicable to the proceedings under this statute.

By whom it may be created.] The right to acquire a lien under the law relating to the city and county of New York, is confined, as we have seen (*ante*, *p.* 200), to the original contractor, and his sub-contractor or employee, or person furnishing materials. Under the statute, however, here considered, *any person* performing labor upon the building or appurtenances, and *any person* furnishing materials for the same, may acquire a lien; though in respect to persons furnishing materials, the statute requires that such persons must reside within the county where the building is situated. (*a*) *Laws of* 1854, *p.* 1086, *secs.* 1, 5, *and* 6; *Laws of* 1858, *p.* 324.

The right to acquire a lien is personal, being confined to the party performing the labor, or furnishing the materials; and therefore, an assignee of a claim for work performed, or materials furnished, cannot acquire a lien under the statute. *See* 4 *Abb. Pr. R.* 263; *s. c.* 3 *E. D. Smith*, 632. The "assignee" referred to in sections two, three, five and six, is an assignee performing labor or furnishing materials.

Against whom it may be created.] The lien is to be acquired against the *owner* of the house or building, and appurtenances to any house or building, upon which labor is performed, or materials furnished. *Laws of* 1854, *p.* 1086, *sec.* 1.

And see generally on this subject, what is said *ante*, *p.* 200, under the same head, in reference to the New-York law, which is applicable to the proceedings here considered.

Extent of Owner's Liability.] The statute provides that the owner of the building and premises shall be liable to the

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(*a*) Whether it is not sufficient that the person furnishing materials is a resident of any one of the counties over which the act extends, *quære?* See *Laws of* 1854, *p.* 1086, *secs.* 1, 5, *and* 6; and *Nott's Lien Law*, 199.

party having a lien for the value of the labor and materials furnished, to the extent of the right, title and interest of such owner in the house or building and appurtenances, and the lot, parcel, or farm of land upon which the same stand, existing at the time the notice of lien is filed. *Laws of* 1854, *p.* 1086, *sec.* 1,

But whenever the labor performed and materials furnished shall be upon the credit of any contractor, who shall have made a contract therefor with the owner of the property, or upon the credit of any sub-contractor, or the assignee of any contractor, the provisions of the statute shall not oblige the owner of the property to pay for or on account of any labor performed or materials furnished for such house, building, or appurtenances, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by said contract. *Ib. sec.* 2.

The statute, however, contains an exception to the limitation of the owner's liability above stated; and in this respect is unlike the statutory provisions relating to the city and county of New York. The third section provides, that if the owner of any building *altered* or *repaired* by contract shall pay to any person any money on such contract by collusion, for the purpose of avoiding the provisions of the statute, or before the right of any claimant to file a notice of lien has expired, or in advance of the terms of any contract, and the amount still due the contractor or his assignee after such payment has been made, shall be insufficient to satisfy the demands made in conformity to the provisions of the act, the owner shall be liable to the amount that would have been due and owing to said contractor or his assignee, at the time the notice of lien is filed, in the same manner as if no such payment had been made. *Ib. secs.* 2, 3.

It is also further provided by sections seventeen and twenty (p. 1090),—making another variation from the New-York law,—that if judgment is rendered in favor of the claimant and docketed with the county clerk within one year after the notice of lien is filed, the judgment shall thereupon be a lien upon the real property of the person against whom it is

obtained, to the extent that other judgments are now made a lien thereon, and that if a transcript of such judgment is docketed in the other counties of the State, it shall in like manner be a lien upon the property of the defendant situated in those counties, to the same extent as other judgments. Thus, it seems, a liability may be created against the owner in favor of a sub-contractor, or other party dealing with the contractor, as well as in favor of the contractor himself, to the extent of the owner's interest in any real property situated within the State.

In respect to the owner's liability under the New-York law, which is identical with this, except as above stated, see under the same head, *ante*, *p.* 203.

Extent of the Lien.] The claimant's lien extends only to the right, title, and interest of the owner in the house or building and appurtenances, erected, altered, or repaired, and in the lot, parcel, or farm of land upon which the same stand, existing at the time the notice of lien was filed. *Laws of* 1854, *p.* 1086, *sec.* 1.

In respect, however, to the lien of the claimant's judgment, when obtained against the owner, it may, as we have seen, be made to extend to all the real property of the owner, situated within the State.

See further on this subject, *ante*, *p.* 207, under the New-York law, which is substantially the same as this statute.

How Lien created.] The lien is created by the contractor, sub-contractor, laborer, or persons furnishing materials, serving the notice prescribed by the statute, upon the town clerk of the town where the property is located, within thirty days after the performance and completion of the labor, or the final furnishing of the materials. *Laws of* 1854, *p.* 1087, *sec.* 4. In respect to the New-York law, see *ante*, *p.* 208.

But no lien will attach to the building, &c., unless the notice is filed by the clerk; and when filed, the notice is thereafter to operate as an incumbrance upon the property. *Sec.* 4, *supra.*

Requisites of the Notice of Lien.] The notice of lien is required by the statute to be in writing, and must specify the amount of the claim, and the person against whom the claim is made, the name of the owner of the building, and if in a city or village, the situation of the building by street and number, if the street be known. *Sec.* 4, *supra.*

The notice, also, if the claimant is a person who has furnished materials, should show that such claimant resides in the county where the building is situated. *See ante, p.* 248, *and note.*

It should also state the name of the claimant, and whether he is a contractor or sub-contractor, or assignee or laborer, or person furnishing materials. *See* 1 *E. D. Smith*, 716; *Nott's Lien Law*, 10.

The notice, also, should show, that the labor was performed or materials furnished in building, or altering or repairing, the house or building and appurtenances, and the town and and county in which the same is situated. And it should describe the premises with reasonable certainty, and if they are situated in a city or village, the street and number should be given, if the street be known. *Laws of* 1854, *p.* 1086, *sec.* 4.

As the statute requires the notice to specify the amount of the claim, the omission to state any sum as due to the claimant, would no doubt render the proceedings to acquire a lien, illegal and void. And the claimant should, also, be careful to state in the notice, the whole amount due to him; as his subsequent recovery would be limited to the amount there claimed. *See* 1 *E. D. Smith*, 671.

In respect to the other matters expressly required to be stated in the notice, the statute, as we have seen, requires the notice to specify the "person against whom the claim is made," "the name of the owner of the building," and "if in a city or village, the situation of the building by street and number, if the street be known." *Sec.* 4, *supra.* And in these respects the statute is substantially like that relating to the city and county of New York, as to which see *ante, p.* 211. For forms of notice, see *Appendix*, Nos. 152, 153.

In order to the acquisition of the lien, the statute must be strictly pursued. *See* 2 *E. D. Smith*, 611. And the court will not, in the subsequent proceedings to enforce the lien, disregard or amend any defect in the notice to be filed, which is made by the statute a matter of substance. *See* 1 *E. D. Smith*, 654.

Duty of the Town Clerk.] The town clerk is required by the statute to enter the particulars of the notice of lien in a book to be kept in his office, to be called the "Lien Docket," which is required to be suitably ruled in columns headed "Claimants," "Against whom claimed," "Owners," "Buildings," "Amount claimed," "Date of the filing of the notice, hour, and minute," and "What proceedings have been had." *sec.* 4, *supra.*

The names of the owners and persons against whom the claims are made, are to be entered in the book in alphabetical order. *Ib.*

At the time of filing the lien, a fee of ten cents must be paid to the clerk. *Ib.*

And no lien will attach to the land, buildings, or appurtenances, unless such notice be filed by the clerk; and the notice, when filed, is thereafter to operate as an incumbrance upon the property. *Ib.*

II. *Proceedings in Courts of Record to enforce Liens.*

Action to be commenced.] The statute provides, in effect, that any contractor, sub-contractor, or laborer performing any work, or assignee thereof, and any resident of the county in which the building is situated (see *ante*, *p.* 248, *and note*) furnishing any materials therefor, may, after such labor has been performed, or materials furnished, and after the service of the notice of lien above-mentioned, bring an action to enforce such lien. *Laws of* 1854, *p.* 1087, *sec.* 6.

Within what time the action to be commenced.] The pro-

ceedings to enforce the lien must be commenced within one year from the time the notice of lien is filed. *Ib.* 1091, *sec.* 20.

The owner, however, or the attorney or agent of the owner, may serve upon the claimant a notice requiring him to commence an action for the enforcement of his lien, within twenty days after the service of such notice. For form, see *Appendix*, No. 173. And if such notice is given the action must be commenced within the time mentioned in the notice; or, upon filing with the town clerk an affidavit of the service of the notice, and of the claimant's omission to commence such action within the time required, the lien will be discharged. *Ib.* 1092, *sec.* 23, *sub.* 4. For form of affidavit, see *Appendix*, No. 174. The like notice may also be served by the contractor of the owner, or a sub-contractor, and with the like effect in all respects (*sec.* 23, *sub.* 4, *supra*); and in this and other respects, the statute is unlike that relating to the city and county of New York. *See ante, p.* 243, *and note.*

The claimant, may instantly, however, on filing his lien, if he is in a position to demand relief, institute proceedings to enforce the same. See under the same head, *ante, p.* 215, in reference to the New-York law.

The Courts and their Jurisdiction.] The courts having jurisdiction of the action to enforce the lien, are the Supreme Court, the county courts, and justices' courts. *Laws of* 1854, *p.* 1087, *secs.* 6, 8.

In the Supreme Court and the county courts, the amount of the lien must exceed fifty dollars. In the justices' courts, the amount may be one hundred dollars or under. *Id.* In respect to proceedings in justices' courts, see *post, p.* 263.

In the Supreme Court, or the county courts, the action must be brought in the county where the property is situated. *Sec.* 6, *supra.* In justices' courts, the action must be brought in the town where the property is situated. *Sec.* 8, *supra.*

And for the purpose of more effectually transacting the business contemplated by the statute, the Supreme Court

and the county courts, are deemed to be always open. *Sec.* 6, *supra.*

For the jurisdiction of the courts under the New-York law, see *ante*, *p.* 216.

Parties to the Proceedings.] By the statute, the claimant and the owner are the only persons who are required to be made parties to the action; though no doubt others may be brought in as parties, at the instance of the claimant or the owner, and to the same extent as under the New-York statute.

The statutory provisions under consideration, are substantially the same in respect to the parties to the proceedings, as were those relating to the city and county of New York, prior to the amendment of 1855. And under the New-York statute, prior to that amendment, it was the constant practice, where the proceeding to foreclose was instituted by a sub-contractor, or other party dealing with the contractor, to unite the contractor as a party to the proceeding. His presence was said to be necessary in order to do complete justice, 1 *E. D. Smith*, 710, 711; and he was made a party on the application of the claimant as well as the owner. *Ib.; and see Id.* 713; *Id.* 719; *Id.* 699; *Nott's Lien Law*, 124, 126; *and see ante*, *p.* 224. The claimant, also, under the New-York statute, was permitted to make prior lien holders parties to his action, with a view of enabling him to impeach the validity of their liens, or to deny the amount of them, or to allege some higher equity in his own favor. 1 *E. D. Smith*, 673; *Id.* 699; *Id.* 664. The amendment of 1855 affirmed the powers thus exercised by the court, and in respect to the contractor, authorized a judgment to be rendered against him when he was made a party defendant, for the amount due from him to the plaintiff, in addition to the judgment against the owner. *Laws of* 1855, *p.* 760, *secs.* 4, 5. The latter provision, authorizing a judgment against the contractor, cannot, of course, apply to the statute under consideration; though in other respects, the practice under the New-York law, relating to the parties to the action, can

properly be made to apply to the statute here considered. See the practice under the New-York law, *ante*, *p.* 224.

The Plaintiff's Notice and Bill of Particulars.] The action is commenced by the service of a notice, containing a statement of the facts constituting the claim, and the amount thereof, on the owner of the property, or his agent, requiring the owner to appear in person or by attorney, within thirty days after such service, and answer the same, and to serve a copy of such answer, together with a notice of any set-off that he may have, on the claimant or his attorney; or in default thereof that the claimant will take judgment against the owner for the amount claimed to be due for the labor performed, or the materials furnished, with interest thereon and costs. *Laws of* 1854, *p.* 1087, *sec.* 6. For forms of notice, see *Appendix*, Nos. 154, 155.

The claimant must, also, at the time of the service of the notice, serve upon the owner or his agent, a bill of particulars of the amount claimed to be due from the owner, his contractor, or sub-contractor, verified by the oath of the claimant or his attorney to the effect that the same is true. *Ib.* 1089, *sec.* 10. For form, see *Appendix*, No. 156.

The bill of particulars should contain all the items of the plaintiff's claim; and he will not be permitted to recover for work performed or materials furnished which are not included in it. *See* 3 *Abb. Pr. R.* 475.

How served.] The notice and bill of particulars must be served personally upon the owner, or his agent, unless by reason of absence from the State, or being concealed therein, personal service cannot be made; in which case, the service may be made by leaving a copy of the notice and bill of particulars at the owner's last place of residence, and publishing a copy of the notice for three weeks successively in a newspaper published in the county where the property is situated. *Laws of* 1854, *p.* 1088, *secs.* 9 *and* 10. For forms of affidavits of service, personal and by publication, see *Appendix*, Nos. 157 to 159.

The statute does not indicate the number of times per week the notice is to be published; though a single publication, each week, would no doubt be sufficient.

If the notice is served by publication, the thirty days in which the defendant is required to appear and answer, would commence to run from the date of the first publication of the notice. *Sec.* 9, *supra*.

Entry to be Made in Lien Docket, of Commencement of Action.] To save the plaintiff's rights, and prevent the equities of third parties arising, the plaintiff should, after his action is commenced, cause a proper entry to be made in the lien docket of the town clerk, showing the commencement of proceedings to enforce the lien.

Proceedings in case of Owner's Default.] In case the owner shall not appear, as required by the notice to enforce the lien, then on filing with the county clerk, when the action is brought in the Supreme Court or county court, an affidavit of the service of the notice and bill of particulars, and of the failure of the owner to appear as therein required, the county clerk or the court, as the case may be, may assess the amount of the plaintiff's claim. *Laws of* 1854, *p.* 1089, *sec.* 11. For forms of affidavits, see *Appendix*, Nos. 157 to 160.

In case the notice to enforce the lien is served by publication, the affidavit of service should not only show the fact of publication in the manner directed by the statute; but also the facts justifying the service by publication.

The plaintiff upon the assessment of his damages, must produce evidence to establish the value of his labor or materials, and that the same was performed or used by the owner or his agent, original contractor, or assignee of such contractor, in erecting, altering, or repairing such house, building, or appurtenances. *Ib. sec.* 5.

The plaintiff must, also, upon the assessment, give evidence showing that he has acquired a valid lien upon the premises of the defendant. This proof would consist of a copy of the notice of lien, duly certified by the town clerk,

whose certificate should also show the time and fact of the filing of the notice. *See Nott's Lien Law*, 206.

Upon the assessment of the plaintiff's damages, judgment shall be entered thereon establishing the amount of the lien, with costs; and execution shall thereupon issue for the collection and enforcement of the claim so adjudicated and established, in the same manner as executions upon other judgments in said courts, in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title, and interest which the owner had in the premises at the time of filing the notice of lien. *Sec.* 11, *supra*. For form of judgment, see *Appendix*, No. 161; and for form of execution, see *Appendix*, No. 164.

Defendant's Answer and Notice of Set-off.] The statute directs that within thirty days after the service of the plaintiff's notice and bill of particulars, the defendant shall serve the claimant or his attorney with a copy of his answer, and also with a notice or bill of particulars of set-off, if he has any. *Laws of* 1854, *p.* 1088, *secs.* 7, 13. For forms, see *Appendix*, No. 162.

The answer is required to be duly verified by the oath of the owner, his agent or contractor, to the effect that the same is in all respects true. *Ib.*

The service of the answer and notice, or bill of particulars of set-off, upon the claimant or his attorney, must be personal. *Sec.* 7, *supra*.

But the service of a notice of set-off, or bill of particulars of set-off, is unnecessary to entitle the owner to prove that the work was not done in accordance with the contract, or that the contract has not been performed; nor is the service of the notice necessary to entitle him to recoup his damages for imperfections in the work. It is only when a *set-off* is claimed, that the defendant is required to serve a bill of particulars of the same. *See* 1 *E. D. Smith*, 697.

Amendments.] The statute does not provide for amend-

ments in these proceedings; and in that respect it is the same as the statute relating to the city and county of New York. Under the latter statute, however, it has been held that while the court will not allow an amendment with a view of remedying a material defect in the claimant's notice of lien, yet in respect to the proceedings to enforce or foreclose the lien, that amendments will be allowed to the same extent as in ordinary actions. *See ante p.* 227. And the same practice would no doubt be proper under the statute here considered.

Issue, how formed.] The issue is formed, when the action is in the Supreme Court or a county court, by the service of the plaintiff's notice and bill of particulars, and the defendant's answer, duly verified, with a bill of particulars of the defendant's set-off, if any, annexed thereto. *Sec.* 13, *supra.*

Notice of Trial and other Proceedings.] Issue being joined between the parties, and at least ten days before the court, either party may give notice of trial. And the cause is put upon the calendar by either party furnishing the clerk of the court with a note of issue, the same as is required in other actions. *Ib. sec.* 14; *Code of Pro.*, § 256. And the ordinary practice in respect to the subsequent proceedings, before trial, such as the affidavit of merits, and the like, is to be pursued. *Id. ibid.*

Trial, and Proceedings thereon.] The action is to be governed and tried in all respects as upon issues joined in other actions arising upon money demands on contracts. *Sec.* 14, *supra.*

1. *What the Claimant must show.* In respect to the proof which the claimant must give to establish his claim, he would, without doubt, be required to prove the same facts which it would be necessary to establish to entitle him to recover in an ordinary action for work performed and mate-

rials furnished; and also the additional facts showing that he has acquired a valid lien upon the premises as against the owner.

We have seen, under the New-York law (*ante*, *p.* 229), that the claimant must show a contract between the owner and the contractor; and if the proceeding is instituted by a sub-contractor, or other party dealing with the contractor, that he must also show that the work was performed, or the materials furnished, in conformity to the terms of that contract. This seems to be unnecessary, under the statute here considered; but it is sufficient, if the claimant upon the trial produces evidence to establish the value of the labor and materials, and that such labor was performed for, or that such materials were used by, the owner or his agent, or the original contractor, or his assignee, in erecting, altering, or repairing the house or premises in question. *Laws of* 1854, *p.* 1086, *sec.* 5; *and see Ib. sec.* 1; *and Nott's Lien Law*, 207.

In respect to the evidence required to be given by the claimant, in other respects than as above stated, see the practice under the New-York Law, *ante*, *p.* 228.

2. *What the Owner may show in Defence.* The owner may show in defence that the claimant has not acquired any lien under the statute; and generally, he may, in other respects, avail himself of the same defences which he would be entitled to show in an ordinary action commenced for the recovery of the value of the work performed, or the materials furnished. Thus, he may introduce and prove any offsets which he may have to the plaintiff's claim, if he has given the plaintiff notice of the same, in the manner provided by the statute. *Laws of* 1854, *p.* 1088, *secs.* 7, 13; and see under the New-York law, *ante*, *p.* 232. And whenever the proceeding is instituted by a contractor, and the owner or his agent has given the notice prescribed by section eighteen of the statute (*Laws of* 1854, *p.* 1091), requiring all persons having claims to present the same as therein provided, he may also present as a set-off to the plaintiff's claim, the claims and liens presented, established, and allowed in pursuance of the notice so given. *Ib. sec.* 19. And the justice

before whom, or the judge of the court in which, the action is commenced, upon the request of the owner or his agent, may grant a stay of proceedings sufficient to enable the owner to give such notice, and call in such claims. *Ib.*

See further under this head, *ante*, *p.* 248, "Extent of owner's Liability." And in respect to the defences of which the owner may avail himself under the New-York law, see *ante*, *p.* 232.

Witnesses, &c.] The rules of the Code of Procedure in respect to witnesses, their competency and examination, and the examination of parties, apply to these proceedings.

In proceedings under the statute relating to the city and county of New York, where the action was commenced by a person furnishing materials in pursuance of an agreement with the contractor,—it was held that the contractor, though a party defendant in the action, was a competent witness for the plaintiff. 2 *E. D. Smith*, 590; *s. c.* 2 *Abb. Pr. R.* 106; and see *ante*, *p.* 234.

Judgment.] The statute does not point out the form or extent of the judgment to be entered upon the action to enforce the lien, except that judgment may be rendered the same as in other actions arising on money demands upon contracts. *Secs.* 11 *and* 14, *supra.* Under the statute relating to the city and county of New York, which assumes, somewhat, to direct the form of the judgment, it is settled that the judgment must be special, and must direct a sale of the owner's interest in the specific premises upon which the lien exists, &c., substantially like judgments upon mortgage foreclosures. *See ante*, *p.* 234. It may well be doubted, however, whether, under the statute here considered, anything more than a general judgment against the owner for the amount claimed, is intended. *See Laws of* 1854, *p.* 1087, *secs.* 6, 11, *and* 14. The execution which is issued upon the judgment is special,—the statute requiring it to direct the officer to sell the right, title, and interest which the owner had in the premises at the time the notice of lien was filed

(*secs.* 11 *and* 14, *supra*); and thus, the execution seems fully to answer the purpose of a special judgment. Besides, the judgment, when docketed in the clerk's office of a county, is, by the statute, general in its operation as a lien upon the real property of the owner situated within that county. *Ib. secs.* 17 *and* 20.

If judgment is rendered against the claimant, the town clerk is required to enter the word "discharged," under the last head in the docket, on receiving a transcript from the county clerk or justice that such a judgment has been rendered. *Ib. sec.* 17.

In respect to the judgment under the New-York statute, see *ante p.* 234; and see as to the effect of a judgment under that law, *ante*, *p.* 237. For forms of judgment, see *Appendix*, Nos. 161 and 163.

Transcript of Judgment, &c.] If judgment is rendered in the proceedings, and docketed with the county clerk, within a year after the notice of lien is filed, it is made, by the statute, a lien upon the real property of the person against whom it is obtained, to the extent that other judgments are now made a lien thereon. *Laws of* 1854, *p.* 1091, *sec.* 20.

And a transcript of every judgment rendered under the statute, headed "Lien Docket," is required to be furnished by the clerk of the county where rendered and docketed, to the successful party, who may file the same with the county clerk of any other county; and the same shall thereafter be a lien on the real property in the county where the same is filed and docketed, of every person against whom the same is rendered, in like manner, and to the same extent, as in other actions for the recovery of money arising on contract. *Ib. sec.* 17.

Executions.] It is provided by the statute, that upon judgment being rendered in favor of the claimant, an execution for the collection and enforcement thereof may issue, in the same manner as executions upon other judgments in

actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises at the time of filing the notice of lien. (*a*) *Secs.* 11 *and* 14, *supra.* For form, see *Appendix*, No. 164.

And it would be irregular for the execution to direct the sale of the *property* instead of the *owner's interest* therein. *Ib.; and see* 4 *Abb. Pr. R.* 205, 208, *note; s. c.* 3 *E. D. Smith*, 637; *Id.* 642.

The statute is silent in respect to the enforcement of the judgment, where it has been docketed in the clerk's office of a county so as to make it a lien upon other real estate than that upon which the lien was first obtained. In such case, an execution in the usual form, against the real property of the defendant, situated in the county, and owned by him at the time the judgment was docketed, would no doubt be held to be proper. (*b*) For form, see *Appendix*, No. 165.

If judgment should be rendered against the claimant, execution for the owner's costs and disbursements issues, the same as in judgments in other actions. *Secs.* 11 *and* 14, *supra.*

Costs and Disbursements.] The statute directs costs and disbursements to be allowed to either party, upon the principles, and by the same rules in such proceedings, as they are now allowed by law in actions arising on contract; and they shall be included in the judgment recovered in the same. *Laws of* 1854, *p.* 1090, *sec.* 16. In respect to costs in actions, see *Code of Pro.* §§ 304 to 309.

The costs are not recoverable until the service of the notice to foreclose the lien. 1 *Code R., N. S.*, 230.

(*a*) Under the New-York law, as we have seen, where the owner is personally liable for the debt, and the premises upon which the lien was obtained are insufficient to satisfy it, the plaintiff is permitted to have execution against the owner, generally, for the deficiency. *See ante, p.* 236. The same relief would no doubt be afforded, in some form, under the statute here considered; though the statute does not give any directions on the subject.

(*b*) See *ante*, p. 248 to 250; and see also note *a*, above.

Whenever a judgment is rendered against the owner, and in favor of any laborer, or person furnishing materials, and the owner has funds in his possession due to the contractor, the costs of the proceeding are to be deducted from such funds, unless otherwise directed by the court in which the action is brought. *Laws of* 1854, *p.* 1090, *sec.* 15.

In respect to costs under the New-York law, see *ante*, *p.* 239.

Appeals.] After judgment has been rendered in pursuance of the statute, either party may appeal therefrom in the same manner, and within the time, appeals may now be taken in actions for the recovery of money arising on contract. *Ib. sec.* 21; *Code of Pro.* §§ 323 *to* 348.

And the appeal is thereafter to be heard, governed, and determined upon the same principles and by the same rules as appeals in actions, with the like costs and disbursements; and the judgment thereon is to be enforced and collected in the same manner as other judgments on appeals. *Sec.* 21, *supra.*

III. *Proceedings in Justices' Courts to enforce Liens.*

Action to be Commenced.] We have seen that justices' courts of the town where the premises are situated, have jurisdiction in these proceedings, where the amount of the lien is one hundred dollars or under. *Laws of* 1854, *p.* 1088, *sec.* 8.

The action is commenced by the service of a notice upon the owner, or his agent, requiring the owner to appear before a justice of the town in which the property is situated. *Ib.* The notice must contain a statement of the facts constituting the claim, and the amount thereof; and must require the owner to appear before the justice in person or by attorney, at a time certain, not less than thirty days after such service, and answer the same, or in default thereof, that the claimant will take judgment against the owner for the amount so claimed to be due, with interest thereon and costs. *Ib.*

At the time of the service of the notice, a bill of particulars of the amount claimed to be due from the owner, his contractor or sub-contractor, verified by the oath of the claimant or his attorney, to the effect that the same is true, must be served upon the owner or his agent. *Ib. sec.* 10. For forms of notice and bill of particulars, see *Appendix*, Nos. 166, 167, 168.

Service of Notice and Bill of Particulars.] The notice and bill of particulars may be served upon the owner or his agent, anywhere within the State; and they must be served personally, unless by reason of absence from the State, or being concealed therein, personal service cannot be made; in which case the service may be made by leaving a copy of the notice and bill of particulars at the owner's last place of residence, and publishing a copy of the notice for three weeks successively in a newspaper published in the county where the property is situated. *Laws of* 1854, *p.* 1088, *secs.* 9, 10. The bill of particulars need not be published with the notice. *Ibid.*

The statute does not specify the number of times per week the notice must be published; though a single publication each week would probably be sufficient.

If the service of the notice is by publication the thirty days in which the owner is required to appear and answer, will commence to run from the date of the first publication of the notice. *Sec.* 9, *supra.* For forms of affidavit of service, personal as well as by publication, see *Appendix*, No. 169.

Commencement of Action to be noted in Lien Docket.] To preserve the rights of the plaintiff, and prevent the equities of third parties arising, a proper entry should be made in the lien docket of the town clerk, showing the commencement of an action to enforce the lien.

Proceedings if Owner does not appear.] In case the owner does not appear, as required by the notice served,

then, on filing with the justice an affidavit of the service of the notice and bill of particulars, and the failure of the owner to appear as therein required, the justice may assess the amount of the plaintiff's claim. *Sec.* 11, *supra.* For form of affidavit, see *Appendix*, No. 170.

Upon such assessment, judgment shall be entered, establishing the amount of the lien with costs; and execution shall thereupon issue for the collection and enforcement of the claim so adjudicated and established, in the same manner as executions upon other judgments in justices' courts, in actions arising on contract, for the recovery of money only, except that the execution shall direct the officer to sell the right, title, and interest, which the owner had in the premises, at the time of filing the notice prescribed by the statute. *Sec.* 11, *supra.*

See further on this subject, *ante*, *p.* 256. What is there stated in respect to the practice in the Supreme Court, and in the county courts, is applicable, also, to the proceedings in justices' courts.

Issue and trial in Justices' Courts.] On the appearance of both parties before the justice, the owner is required to put in an answer, in writing, duly verified, with a bill of particulars of his set-off, if any, annexed. *Sec.* 12, *supra.* The statute does not specify the person who may make the verification; but, like that in the Supreme Court and the county court, it may, no doubt, be made by the owner or his agent, or contractor, and should be to the effect that the answer is in all respects true. *See Ib. sec.* 7. For form of answer, &c., see *Appendix*, No. 171.

The issue thus formed by the service of the notice and bill of particulars on the part of the claimant, and the answer and bill of particulars of set-off on the part of the owner, is to be tried and governed by the same rules as other issues in justices' courts; and the judgment therein shall be enforced, if for the claimant, as above provided in respect to the judgment entered upon the owner's failure to appear,—and

if for the owner, as in other actions arising on contract. *Sec.* 12, *supra.*

In respect to the proceedings upon the trial, and the evidence to be given by the claimant to establish his claim, as well as the proceedings of the owner, in his defence. *See ante, p.* 258.

Costs in Justices' Courts.] The costs and disbursements in justices' courts are to be allowed to either party the same as in actions; and are to be included in the judgment recovered. *Sec.* 16, *supra.* In respect to costs in those courts, see 2 *R. S.* 247; *Ib.* 265; *Laws of* 1857, *vol.* 2, *p.* 723; *Pub. Acts, p.* 49.

If the notice was served upon the owner by publication, the expenses incurred for that purpose may be allowed, and added to the amount of costs allowed in those courts. *Sec.* 16, *supra.*

Whenever a judgment is rendered against the owner, and in favor of any laborer, or person furnishing materials, and the owner has funds in his possession due to the contractor, the costs of the proceeding are to be deducted from such funds, unless otherwise directed by the court. *Ib. sec.* 15.

Appeals from Judgments therein.] Either party may appeal from the judgment rendered by the justice, the same, in all respects, as in ordinary actions. And the appeal is to be heard, governed, and determined upon the same principles, and by the same rules, and with like costs and disbursements, as appeals in other actions, and the judgment thereon enforced in the same manner as judgments on appeals are now enforced and collected. *Ib. sec.* 21.

IV. *Miscellaneous Proceedings.*

The Owner may require Claims to be Presented.] The statute provides, that the owner or his agent, may, at any

time, give public notice, in the same manner as notice is required to be given for the sale of real estate by virtue of an execution,(a) to all persons having claims under any of the provisions of the act, against the building, land, or appurtenances in question, at the time of the date of publishing the notice, to present the same, with vouchers in support thereof, to any justice of the peace in the town where the building is situated, on or before a certain hour or day, to be specified in the notice, and to be at least six weeks from the first publication. *Laws of* 1854, *p.* 1091, *sec.* 18. For form, see *Appendix*, No. 172.

In case of the failure of the persons having such claims to present the same, as required by the notice, so given, each and every person so failing will forever lose the benefit of his lien. *Sec.* 18, *supra.*

When the proceeding is instituted by a contractor, the statute authorizes the owner or his agent to give the notice above prescribed, and to present as a set-off all claims and liens thereupon presented and established. *Ib. sec.* 19. And the justice before whom, or a judge of the court in which, the proceedings are commenced, may, upon the request of the owner or his agent, grant a stay of proceedings sufficient to enable the owner to give such notice and call in all such claims; which claims, if established and allowed by the justice, or court, shall be a set-off to such contractor's claim, to the amount so allowed. *Ib.*

The Owner may Require Liens to be Enforced.] The owner, or his agent or attorney, may serve upon the claimant, a notice requiring him to commence an action for the enforce-

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(a) The notice, therefore, must be publicly advertised for six weeks, successively, as follows:

1. It must be fastened up in three public places in the town where the premises are situated;

2. A copy thereof must be printed once in each week, in a newspaper of such county, if there be one;

3. If there be no newspaper printed in the county, then the notice must be published in the State paper once in each week. 2 *R. S.* 368, *sec.* 34.

ment of his lien, within twenty days after the service of such notice. For form, see *Appendix*, No. 173. If such notice is served, and the action is not commenced within the time therein required, upon filing with the town clerk an affidavit of such service, and the omission to commence such action, the lien will be discharged. *Laws of* 1854, *p.* 1092, *sec.* 23, *sub.* 4. For forms of affidavits of service, &c., see *Appendix*, No. 174.

The like notice may also be served by the contractor of the owner, or a sub-contractor, and with the like effect, in all respects. *Sec.* 23, *supra.* And see the statute relating to the city and county of New York, *ante*, *p.* 242.

How long Lien to Continue.] It is provided that every lien created under the provisions of the statute, shall continue until the expiration of one year, unless sooner discharged by the court, or some legal act of the claimant in the proceedings; but when a judgment is rendered therein, and docketed with the county clerk, within the year, it shall be a lien upon the real property of the person against whom it is obtained, to the extent that other judgments are now made a lien thereon. *Ib. sec.* 20.

Under a similar statutory provision, it has been held that the lien expires at the expiration of one year from the commencement thereof; and that neither the pendency of an action will prolong it, nor a judgment subsequently obtained will relate back to it. 3 *Coms.* 305, 308, 309, per Ruggles, J.

In respect, however, to the statute here considered, although the question is not free from difficulty, yet the better opinion is, taking all the provisions of the statute together, that the lien is continued indefinitely, if, within the year, a proper action is brought to enforce it; and that the intention of the section was, rather, to indicate the time within which the action to enforce the lien must be commenced. *See secs.* 4, 11, 14 *and* 20, *supra*; and see *Nott's Lien Law*, 210, 211; and see under the New-York law, *ante*, *p.* 243.

Order in which Liens are to be Paid.] The liens created

and established by virtue of the provisions of the act, are to be paid and settled according to the priority of the notice of lien filed with the town clerk. *Laws of* 1854, *p.* 1092, *sec.* 22.

How Liens Discharged.] All liens created by the statute may be discharged as follows:

1. By filing with the town clerk a certificate of the claimant, or his successors in interest, acknowledged or proved in the same manner as a conveyance of real estate, stating that the lien has been paid or discharged (for form, see *Appendix*, No. 175); or,

2. By depositing with the justice, or clerk of the courts, a sum of money equal to double the amount claimed; which money shall be thereupon held subject to the determination of the lien; or,

3. By an entry of the town clerk, made in the book of liens, that the proceedings on the part of the claimant have been dismissed by the court in which the action to enforce the lien is brought, or a judgment rendered against the claimant; or,

4. By an affidavit of the service of a notice from the owner, or his agent, attorney, contractor, or sub-contractor, to the claimant, requiring such claimant to commence an action for the enforcement of his lien within twenty days after the service of said notice; and the failure of the claimant to commence an action as aforesaid. *Laws of* 1854, *p.* 1092, *sec.* 23.

The lien will also be discharged by the failure of the claimant to commence an action for the enforcement thereof, within one year from the time the notice of lien was filed. *Ib. sec.* 20.

For forms of affidavits under the fourth subdivision above, see *Appendix*, No. 174.

CHAPTER VIII.

MANDAMUS AND PROHIBITION.

Section I. Mandamus. II. Prohibition.

SECTION I.

MANDAMUS.

The writ of mandamus is described by Sir William Blackstone, as a high prerogative writ issuing in the king's name out of the court of King's Bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified and which appertains to their office and duty, and which such court has previously determined, or at least supposes, to be consonant to right and justice. 3 *Bl. Com.* 110; *and see Bac. Abr., Mandamus;* 12 *Wheat.* 561; 2 *Johns. Cas.* 2*d ed.* 217, *note.*

In this State the writ is issued by our Supreme Court, which, in its judicial relation to the sovereign power of the State, the people, possesses the same authority as the King's Bench. The office of the writ is the same here as in England. *Id.* (*a*)

(*a*) For the origin and history of the Writ of Mandamus, and the proceedings therein, see the elaborate notes in 2 *Johns. Cas.*, 2*d ed.*, 217—1 to 81, where the authorities are collected and stated at large.

I. *When, and in what cases, it lies.*

1. *Generally.*] The writ of mandamus issues in all cases where the party has a right to have anything done, and has no other appropriate legal means of compelling its performance. 3 *Bl. Com.* 110; 2 *Barb. S. C. R.* 417; 13 *Id.* 440; 25 *Id.* 73.

The writ will not issue in cases of *doubtful right.* The remedy by mandamus is a legal remedy; and a party will not entitle himself to it unless he has a *clear legal right* to demand what is asked for in his writ. 1 *Kernan*, 563; 13 *Barb.* 444; 12 *Id.* 217; 1 *Wend.* 324; 10 *Id.* 366; 14 *Johns.* 416; 8 *Peters*, 291; 11 *How. U. S. R.* 272.

And there must be no other specific *legal* remedy to which the party can resort for the enforcement of his right. *Id. ibid; and see post.* By legal remedy, is meant a remedy at law; and it is no objection to the granting of the writ that the party may resort to a court of equity for redress; nor that his adversary may be punished criminally for omitting to do the act to compel the performance of which the writ is sought. 10 *Wend.* 395, 397.

The writ, therefore, will not be awarded where the party has an adequate remedy by *action;* as, to compel a *corporation* to transfer stock on its books, 6 *Hill*, 243; 10 *Johns.* 484; 10 *How. Pr. R.* 544; to compel a *county treasurer* to pay money, where he withholds such payment without sufficient cause, 2 *Cowen*, 444; *and see* 6 *Hill*, 244; to compel the *corporation* of the *city of New York* to pay the salary of one of the associate judges of the court of General Sessions of that city, 25 *Wend.* 680; *and see* 2 *Hill*, 45; *and* 25 *Barb.* 73; to compel the *supervisors of a county*, to allow to a person wrongfully assessed the amount of the tax collected from him on such assessment; his remedy being against the assessors personally, 1 *Kern.* 563; or the like. 1 *Wend.* 318; 19 *Id.* 73; 2 *Johns. Cas. 2d ed., note*, 217–9. Nor will the writ be awarded where the party has a remedy by *writ of error* or *appeal;* as, to compel a *subordinate court* to vacate a rule arresting judgment, 1 *Cowen*, 143; or to enter the satisfac-

tion of a judgment, 10 *Wend.* 546; or to vacate a rule setting aside a report of referees. 21 *Id.* 20; 2 *Johns. Cas.* 2*d ed.*, *note*, 217—6. Nor where the party has *any other specific legal remedy;* as, to compel the delivery of the books and papers belonging to an office, where the relator's title to such office is clear and free from reasonable doubt; his remedy, in such case, being by summary process under the statute, 5 *Hill*, 616, 631, *note;* 7 *How. Pr. R.* 124; *and see* 14 *Id.* 315; or, to restore a party to the possession of an office where the right to such office is in dispute; the remedy being by action under the Code of Procedure. 20 *Barb.* 302; 5 *Hill, and* 7 *How. Pr. R. supra.*

But where a specific duty is imposed by a statute upon public officers or bodies, they may be compelled to execute it by mandamus, although an action for damages might also lie. 12 *How. Pr. R.* 224, *and cases there cited;* and see 20 *Barb.* 294. And, it seems, in order to deprive a party of his remedy by mandamus, the remedy by action must not only be adequate, but it must be specific. 1 *Barb. S. C. R.* 34; but see 6 *Hill*, 243, per Bronson, J.

It has been said that the general rule that mandamus will not lie where there is an adequate remedy by action, does not apply where the writ is directed to corporations and ministerial officers. 23 *Wend.* 458; 2 *Barb. S. C. R.* 398; and see 2 *Hill*, 45. But this is denied by Parker, J., in *The People* v. *The Supervisors of Chenango County*, 1 *Kernan*, 573, 4. "If such an exception exists," he observes, "it can extend no further than was expressly recognized in *McCullough* v. *The Mayor of Brooklyn* (23 *Wend. supra*), viz.: if there be a refusal to perform a duty expressly devolved on the corporation, though an action on the case would *perhaps* lie, a mandamus may be awarded; and that is hardly more than saying, 'If the remedy by action be doubtful a mandamus will lie.'" *Ib.;* and see also, 2 *Johns. Cas.* 2*d ed.* 217—11, *note.*

But although a mandamus will not be awarded where the party has another adequate legal remedy, yet the converse of that proposition does not hold true. And there are many

cases where, although the party has no other remedy, a mandamus will not lie. Motions for new trials on the weight of evidence, on the ground of surprise, or to let in newly discovered evidence, and applications for amendments, for relief against defaults, and the like, are among the number. Such questions are addressed to the sound discretion of the court of original jurisdiction; and their decision is final. 20 *Wend.* 662, per Bronson, J.; and see 18 *Id.* 98, per Tracy, Senator; and 1 *Denio*, 679.

The mandamus is a prerogative writ which the court will issue or withhold, according to its *discretion*, 4 *Hill*, 583; 13 *Barb.* 450; 1 *Cowen*, 502; 2 *Johns. Cas.* 2*d ed.* 217—4, *note;* as, where it is manifest that the writ could not accomplish the object designed, 12 *Barb.* 217; 15 *Id.* 608; 20 *Wend.* 108; or where the end of it is merely to try a private right, 2 *Johns. Cas.* 2*d ed.* 217–5, *note;* or where the granting of it would be attended with manifest hardships and difficulties, 15 *Barb.* 617; 1 *Cowen*, 502.

But although the court may grant or refuse the writ in its discretion, yet this discretion is not merely arbitrary and capricious, but is regulated by well-settled rules and principles of law, which have been incorporated into our system of judicature; and they will be uniformly regarded in determining the question whether the writ shall be awarded or not. *See* 2 *Johns. Cas.* 2*d ed.* 217—4, *note.*

It may also be stated, generally, that the writ of mandamus is never granted except for *public purposes*, and to compel the performance of *public* duties. *Bac. Abr.*, *title Mandamus.* 3 *Bl. Com.* 110; 2 *Johns. Cas.* 2*d ed.* 217—5, 6, *note.*

And so, it will not be granted unless the application has been preceded by a distinct demand of the specific thing the performance of which is the object of the mandamus, and by a refusal of performance, or conduct equivalent to it. *Q. B., Hil. T.* 1843; 7 *Lond. Jur.* 233; 8 *Id.* 496; 3 *A. & E.* 477. But it is not necessary that the word *refuse* should be used; it is sufficient if it appear that the defendant withholds compliance and distinctly determines not to do what is required. 3 *A. & E.* 217.

2. *To Inferior Courts, &c.*] The writ is frequently resorted to for the purpose of compelling inferior judicial tribunals to do some act belonging to their duty. 2 *Johns. Cas.* 2*d ed.* 217—15 *to* 31, *notes.* Thus it has been allowed to compel a court of sessions to enter judgment on a verdict where that court had no power to grant a new trial. 1 *Johns. Cas.* 179; *and see* 2 *Johns.* 371; to compel a court or judicial officer to seal or amend a bill of exceptions, 1 *Cai. R.* 511; 2 *Johns.* 279; 2 *Johns. Cas.* 118; 5 *Wend.* 132, *note;* to compel a subordinate court to give judgment in order that a writ of error may be brought, 2 *Johns. Cas.* 215; 19 *Johns.* 247; 1 *Cowen*, 143; 9 *Wend.* 182; to allow an appeal to be placed on the calendar and to hear the argument thereof, and to give judgment thereon, where it had been dismissed without authority, 13 *How. Pr. R.* 279; *and see Id.* 398, 401; to settle a case after the denial of a motion to set aside the report of referees, so as to enable the party to appeal, *see* 20 *Wend.* 663; to approve a new appeal bond on an appeal from a judgment of a justice of the peace, 1 *How. Pr. R.* 196; to vacate its rules and orders in certain cases, *Ib.* 109, 111, 200; 18 *Wend.* 534; *but see Id.* 79; 2 *Denio*, 192; to compel a justice of the peace to issue an execution upon a judgment rendered by him, 2 *How. Pr. R.* 109; *and see* 22 *Barb.* 502; and a warrant in summary proceedings to recover the possession of land, 5 *Abb. Pr. R.* 206; and a county judge to file his decision after it is completed, 5 *How. Pr. R.* 47; 2 *Johns. Cas.* 2*d ed.* 217—15 *to* 31, *note.*

But the writ of mandamus will not be granted to be directed to a court acting under a special commission which has expired by its own limitation previous to the application for the writ, 20 *Wend.* 108; nor to compel a court of common pleas to permit a cause pending there to be removed to the Circuit Court of the United States, 2 *Denio*, 197; nor to vacate a rule arresting judgment, 1 *Cowen*, 143; nor to compel obedience to an order made by another court, 11 *How. Pr. R.* 563; nor to compel an inferior court to punish for a contempt, where the civil rights of an individual are not

implicated in the proceeding, 4 *Cowen*, 49; nor to compel a ministerial officer to disobey an injunction, unless it appears to be plainly void for want of jurisdiction, 4 *Hill*, 581; nor to compel a justice to proceed in a suit before him in which he has given judgment of nonsuit, which subsequently was reversed in the common pleas, 9 *Wend.* 503; nor for the purpose of controlling the mere chamber business of a judge of a subordinate court, 5 *Cowen*, 31; nor the practice of other courts, 2 *How. Pr. R.* 59; *and see also*, 2 *Johns. Cas. 2d ed.* 217—15 *to* 31, *note;* especially that portion of the practice which does not depend upon established principles, or is not regulated by fixed rules. 15 *How. Pr. R.* 392; *and see* 16 *Id.* 200.

And so, where the court or officer has *acted judicially* in making a decision or order, whether the decision or order be right or wrong, the party will not be permitted to have the same reviewed or corrected by mandamus. The writ will be awarded to set an inferior court in motion when it has refused to act; but not for the purpose of requiring the court to come to any particular decision, or to retrace its steps when it has already acted. 2 *Denio*, 192; 18 *Wend.* 79; 20 *Id.* 658; 3 *How. Pr. R.* 30; 13 *Id.* 277. Thus, the writ has been denied to compel an inferior court to grant a new trial in a cause before it, where it was alleged injustice had been done to one of the parties, 2 *Chitty*, 250; to reinstate an appeal which the court had dismissed, 3 *Binney*, 273; *and see* 20 *Wend.* 658; 1 *Denio*, 679; to vacate a rule setting aside a report of referees, although the court clearly erred in the decision made, 21 *Wend.* 20; to compel a judge to issue his warrant on a complaint for an intrusion and settlement upon Indian lands, where he had refused to do so, after hearing evidence on the subject, 1 *Denio*, 617; 1 *How. Pr. R.* 186; to compel an inferior court to vacate an order authorizing a defendant to enter a judgment *nunc pro tunc*, in a case where the Supreme Court would have denied the application for such order on account of delay in making it, 1 *Denio*, 644; to vacate an order opening a judgment to enable the defendant

to plead a bankrupt discharge, though it was urged that the order interfered with vested rights, 2 *Id.* 191; to vacate a rule setting aside an execution issued by a justice of the peace, on a judgment rendered before him, and docketed in the county clerk's office. 1 *Id.* 646, *note.* Beardsley, J., in denying the motion, said, "The common pleas have acted and decided, and whether right or wrong will not be determined on an application for a mandamus. If the court had no jurisdiction, the order is void; if it had, it is strictly a judicial decision." *Ib.;* and see the cases cited by Tracy, Senator, 18 *Wend.* 89, and by Bronson, J., 20 *Id.* 659.

It is also a rule applicable to this writ, that where inferior tribunals have a *discretion*, and proceed to exercise it, the court have no jurisdiction to control that discretion by mandamus. 2 *Johns. Cas. 2d ed.* 217—19, *note.* The writ, therefore, will not be allowed to compel a subordinate court to grant a new trial upon the merits, 2 *Cowen*, 479; nor to vacate a rule setting aside a report of referees on the ground that it is founded on insufficient evidence, *Ib.* 458; *and see* 19 *Wend.* 68; nor to vacate a rule setting aside a regular default and permitting the defendant to plead on payment of costs, 6 *Cowen*, 392; nor to vacate an order allowing rules for interlocutory judgment and assessment of damages to be entered *nunc pro tunc*, 7 *Id.* 523; nor to vacate the condition of a rule setting aside a *ca. sa.*, for irregularity, 3 *Id.* 59; nor to vacate a rule to quash an appeal taken by default in the absence of the relator's attorney, 7 *Id.* 363; nor a rule granting an amendment without the payment of costs, 8 *Wend.* 509; nor, it seems, to vacate a rule granting an amendment in any case within the power of the court, *see* 16 *Wend.* 617; 20 *Id.* 658; nor to retax a bill of costs, 19 *Id.* 113; nor for the purpose of controlling the mere chamber business of a judge of an inferior court, 5 *Cowen*, 31,—or, the practice in other courts, 16 *How. Pr. R.*, 200; 15 *Id.* 392, *and cases supra;* or the like. *See* 1 *Id.* 417; *Ib.* 371; 1 *Wend.* 73; 18 *Id.* 92.

But, although the Supreme Court will not interfere where the subordinate court has a discretion, and proceeds to

exercise it, yet if the subordinate court refuses to act or to entertain the question for its discretion, the court will interfere so far as to set the inferior jurisdiction in motion, by directing it to proceed and exercise the discretion and powers conferred upon it. 14 *East*, 395; *and see* 19 *Johns.* 260; 18 *Wend.* 92, 95, per Tracy, Senator; 2 *Johns. Cas.* 2*d ed.* 217—23, *note*; 12 *Barb.* 446.

3. *To Corporations and Ministerial Officers.*] The writ of mandamus is also an appropriate remedy to compel corporations and inferior officers, besides those occupying judicial stations, to perform the duties which the law imposes upon them.

With respect to subordinate judicial tribunals and officers, the operation of the writ, as we have seen, has been confined simply to a mandate that they proceed; but as to corporations and ministerial officers, the authority of the writ is recognized to be not only to compel them to act, but to direct the mode and manner in which they shall act. 20 *Wend.* 658; 2 *Barb. S. C. R.* 418; 19 *Johns.* 263; 12 *How. Pr. R.* 224; 13 *Id.* 277. The writ has been allowed, in such cases, to compel the *supervisors of a county* to allow the account of a county clerk for expenses incurred and services performed by him according to law, 18 *Johns.* 242; *and see* 2 *Cowen*, 530; 1 *How. Pr. R.* 163; to compel them to restore the names of certain banks which they had struck off from the assessment roll as made by the assessors, 4 *Hill*, 20; to compel them to levy and collect the amount of a deficiency on the sale of lands foreclosed on loan-office mortgages, 10 *Wend.* 363; to levy and collect the amount of damages sustained by owners of lands taken for the improvement of a public highway, 4 *Barb.* 64; and see, also, in like cases, 19 *Johns.* 272; 5 *Cowen*, 292; 3 *Barb. S. C. R.* 332; 20 *Id.* 294; 12 *How. Pr. R.* 50. And so, where the supervisors of a county have neglected to perform any duty required of them at their annual meeting,—*e. g.*, to issue warrants for the military commutation, they may be compelled by mandamus to meet again and perform that duty.

4 *Selden*, 318. And where a creditor has an account against a county, and no discretion is vested in the board of supervisors in relation to it, and there is a clear legal duty resting upon them to cause the whole amount of the account to be collected and paid, which they refuse to perform, it seems, the only remedy of the creditor is by an application to the court for a mandamus to compel them to perform that duty. 20 *Barb.* 294, 297; *denying the authority in* 14 *Barb.* 52, *and other cases there cited.*

In like manner the writ has been issued to compel *commissioners of highways* to open and work a road which has been laid out by commissioners appointed by an act of the legislature, 19 *Wend.* 56; and to open a road where they had refused to do so, and their decision had been reversed on appeal, and the appellate tribunal had proceeded to lay out the road. 16 *Johns.* 61; 12 *Barb.* 194, 6; 4 *Selden*, 476; 1 *Cowen*, 23; 4 *Id.* 544. And the writ will be granted, in such case, without regard to the near approach of the expiration of their offices; if their term of office expires, it will devolve upon their successors to obey the writ. 19 *Wend.* 56; *and see* 16 *Johns.* 65; 3 *How. Pr. R.* 56.

The writ has been issued, also, to compel a *town clerk* to record the survey of a road, 7 *Johns.* 550; a *county clerk* to record a deed properly acknowledged and certified, 14 *Johns.* 325; the *clerk* of the *Marine Court* of the city of New York, to issue an execution upon a judgment rendered by that court, 13 *How. Pr. R.* 5; 22 *Barb.* 502, *aff.* 13 *How. Pr. R.* 260; 3 *Abb. Pr. R.* 309; the *mayor of a city* to grant a license, where the party was entitled to such license as a matter of legal right, 13 *Barb.* 206; the mayor of a city to administer the oaths of office to persons returned by the inspectors of election, as assessors of a ward, 3 *Hill*, 43; *and see* 4 *Abb. Pr. R.* 36; to compel the *trustees of a school district* to issue their warrant for the collection of a tax, 8 *How. Pr. R.* 358; *Id.* 125; to compel a *sheriff* to execute and give a deed of lands, 1 *Cowen*, 502; 18 *Wend.* 598; 1 *Barb. S. C. R.* 379; 4 *Denio*, 138, *aff.* 2 *Coms.* 485; to compel *canal appraisers* to appraise damages occasioned by a canal, 6 *Cowen*,

518; and the *canal commissioners* to pay the amount of the damages appraised, 7 *Id.* 526; to compel a jury to complete their assessment of damages for the opening of a street in a village, 1 *Barb. S. C. R.* 34; to compel a *county treasurer* to pay the amount of an account which had been legally audited and allowed by the board of supervisors, 15 *Barb.* 529; 19 *Id.* 468; *and see* 23 *Id.* 338; 1 *Selden*, 65; 6 *Hill*, 244; to compel the *auditor* of the canal department to pay a draft drawn upon him by a canal commissioner, 13 *Barb.* 86; to compel *commissioners for loaning moneys* of the United States, to pay over surplus moneys in their hands, 1 *How. Pr. R.* 160; to compel the *comptroller* to issue his warrant to pay certain tolls collected by him for the State, 18 *Wend.* 659; to compel the *comptroller* of the *city of New York*, to draw his warrants upon the chamberlain of the city, for certain moneys ordered to be paid by the corporation, 16 *Barb.* 503; to compel the *common council of Brooklyn* to proceed in the matter of widening a public street, 22 *Barb.* 404; to compel the *trustees of non-resident debtors* to appoint referees in pursuance of the statute, in order to contest the validity of the debts presented and claimed by attaching creditors, 1 *How. Pr. R.* 80; 2 *Id.* 200; to compel a *corporation* to exhibit its books and papers to a director or corporator, he having a right at all reasonable times to examine them, 1 *How. Pr. R.* 247; 12 *Wend.* 183; and the like. 2 *Cowen*, 485; 23 *Wend.* 458; 2 *Johns. Cas. 2d ed.* 217—32 *to* 61 *notes.*

But the writ will not be allowed in cases where corporations, and ministerial and other officers have acted *judicially;* nor where they have a *discretion* with regard to the performance of an act, and have exercised the discretion conferred upon them; but if they refuse to act when required by law, the court will compel them by mandamus. And the operation of the writ is the same in these respects as when directed to subordinate judicial tribunals. 19 *Wend.* 56; 12 *Barb.* 446; 2 *Johns. Cas. 2d ed.* 217—12, 32, 37, *notes.* Thus, the writ will not be allowed to compel a *board of supervisors* to audit and allow an account for services as marshal, where they have adjudicated upon the account, and allowed part

and rejected part, 12 *How. Pr. R.* 204; and see to the same effect, 12 *Johns.* 414; 19 *Id.* 260; 9 *Wend.* 508; 1 *Hill*, 362; 14 *Barb.* 52; 1 *How. Pr. R.* 116; 12 *Id.* 224; nor to compel *assessors* to reduce their assessments, where the affidavits produced before them are not in conformity with the statute, *see* 15 *Barb.* 608; nor to compel the *attorney general* to prosecute an action to establish the right of a party to an office, 22 *Barb.* 114; *s. c.* 13 *How. Pr. R.* 179 *and* 3 *Abb. Pr. R.* 131.

And so the writ will not be allowed to compel a *county treasurer* to pay an account audited by a board of supervisors, where the subject-matter of the account is not within the jurisdiction of the board, 6 *Hill*, 244; 23 *Barb.* 350; *s. c.* 13 *How. Pr. R.* 314; nor to compel a *board of supervisors* to correct an assessment roll after the same has been finally acted upon by them, and a warrant for the collection of the taxes issued to the collector of the town, 15 *Barb.* 608; 24 *Id.* 166; *and see* 1 *Hill*, 195; though it is otherwise, it seems, where the mandamus is directed to the *supervisors* of the county of *New York*, 12 *How. Pr. R.* 224, 230; *but see* 13 *Id.* 305; *s. c.* 4 *Abb. Pr. R.* 84; 24 *Barb.* 166; nor to compel the *canal board* to approve or disapprove of a contract for the performance of work on the canal, made by the canal commissioners and other state officers, with the relator, 13 *Barb.* 432; nor to compel the *commissioners of excise*, under the act of 1857, to grant a license, 7 *Abb. Pr. R.* 34; nor to compel the supervisors of a county acting as *county canvassers*, to re-organize for the purpose of correcting the estimate of the votes of the county, or otherwise, after they have acted upon the matter and adjourned, 12 *Id.* 218; *and see* 7 *Abb. Pr. R.* 34; nor to compel *commissioners of highways* to lay out a highway where they had refused to do so, and the referees, on appeal, had simply reversed their decision without having made any order laying out the road, 4 *Selden*, 476; or to erect a bridge upon a site selected by them at a different place from that contemplated by the statute under which they were acting, 24 *Barb.* 241; nor to compel a *corporation* to make transfers of stock on the books of the company, 10 *How. Pr. R.* 544; *s. c.* 1 *Abb. Pr. R.* 128; nor to compel the per-

formance of public duties on the part of a corporation of another State, *Ib.;* nor to compel obedience to an order made by another court, when that court possesses the authority to enforce its own orders, 11 *How. Pr. R.* 563; *s. c.* 2 *Abb. Pr. R.* 90; nor to afford relief against an illegal tax, which is about to be collected, 1 *Hill*, 195; *and see* 15 *Barb.* 608; but see as to the city of New York, 12 *How. Pr. R.* 224; 13 *Id.* 305; nor in other cases. 2 *Johns. Cas.* 2*d. ed.* 217—32 *to* 61, *notes.*

The writ of mandamus is also frequently resorted to for the purpose of *restoring one to an office*, where he is illegally deprived of the possession thereof. The writ, however, confers no title upon the person thus restored; its sole operation being to put him in a situation to enforce his former title if sufficient in law. 2 *Johns. Cas.* 2*d ed.* 217—10, 56, *notes.* The only mode of trying the *title* to an office in dispute is by an information in the nature of a quo warranto; or, now, by action under the Code of Procedure, 3 *Id.* 79; 5 *Hill*, 616; 12 *Barb.* 222; *Code of Pro.* § 428; though, if quo warranto or an action will not lie, a mandamus will be granted upon the principle that the party shall not be without a remedy. 6 *East*, 356; 5 *Hill*, 629; 2 *Johns. Cas.* 2*d ed.* 217—11, *note.*

The writ has been allowed, to compel the proper officers to admit to the possession of his office or place one elected to the office of mayor, 2 *Roll. Ab.*, *Restitution*, *pl.* 4; recorder, *Id. pl.* 6; sergeant, *Id. pl.* 71; alderman, 2 *Bulst.* 122; and brigadier-general, 20 *Barb.* 302; *s. c.* 12 *How. Pr. R.* 126; and see 25 *Barb.* 216; and 2 *Johns. Ca.* 2*d ed.* 217—52, *note.*

The writ has also been granted to compel an insurance company to swear in a director, the company having been created by charter from the crown, 1 *Stra.* 696; to restore the directors of a banking company who were refused the exercise of their rights as directors by a majority of the board, 7 *Louis. R.* 509; as, where the cashier of a bank refused to permit a director to inspect the discount book, and his conduct had been approved by a resolution of the board, 12 *Wend.* 183; and see 1 *How. Pr. R.* 247; and to compel

a medical society to restore a party to membership, where such party had been illegally expelled, 24 *Barb.* 570; 2 *Johns. Cas. 2d ed.* 217—56, 57, *notes, and cases there cited;* and so, also, to compel the trustees of a meeting-house to admit a dissenting minister, who was duly elected, 3 *Burr.* 1265; and it seems, the writ of mandamus is the only proper remedy to put a minister of any religious denomination into possession of the pulpit to which he is entitled, 2 *Barb. S. C. R.* 398, 417, 419; and this, too, notwithstanding such pulpit is occupied by another person, *Ib.;* but see the observations on this case in 7 *How. Pr. R.* 129, per S. B. Strong, J.; *and see post.*

But the court will not grant a mandamus to admit a person to an office, where the office is already filled by another person who has been admitted and sworn, and is in by color of right, 3 *Johns. Cas.* 79; 20 *Barb.* 302; *s. c.* 12 *How. Pr. R.* 126; nor where there is an appropriate remedy by quo warranto or the action substituted in its place by the Code. *Id. ibid.;* and see 5 *Hill*, 616; 20 *Barb.* 302, *supra;* nor where there is a real and substantial dispute as to the title to the office, *Id. ibid;* 7 *How. Pr. R.* 124. The principles which control in affording relief in these cases, are stated by S. B. Strong, J., in the case last cited, as follows; "1st. That a mandamus is inappropriate and should not be issued where there is a real and substantial dispute as to the title to an office. 2d. That where the right of the applicant is clear and unquestionable, and the possession of the official books and papers is all that is necessary to enable him to perform fully and satisfactorily the duties of the office, a resort should be had to the summary process given by the statute to obtain such books and papers, and a mandamus being unnecessary, should not be awarded. But, 3d, That when the title of an applicant to an office is beyond a substantial dispute, so that the objection to it is wholly frivolous, and the possession of the books and papers would not give him the entire control of the office, the remedy by the proceedings substituted by our new Code for the writ of quo warranto, would in many cases be so dilatory as to amount to a failure of justice; and the

writ of mandamus would be proper and should be awarded." *Ib.* 128; and see 20 *Barb.* 302, *supra;* 2 *Johns. Cas. 2d ed.* 217—52 *to* 59, *notes.*

II. *How the Writ is Obtained and Proceedings Thereon.*

Having thus considered the nature of the writ of mandamus, and stated most of the cases in this State, as well where the writ has been allowed as refused, we shall now consider the practice in obtaining the same, and the proceedings thereon.

Who may have the Writ.] In a matter of public right, any citizen may prosecute a mandamus, where the object is to enforce the execution of the common law, or of an act of the legislature. 19 *Wend.* 56; 1 *How. Pr. R.* 186. It has been denied, however, that any citizen can have the writ to compel the performance of public duties on the part of State officers. 13 *Barb.* 449, 450, per Cady. J.

Where the matter relates to private or corporate rights, the title to relief, at the suit of the relator, should appear; otherwise, a mere stranger might obtain a mandamus officiously, and for purposes not desirable to the real party. 19 *Wend.* 56; *and* 1 *How. Pr. R.* 186, *supra;* and see 10 *Wend.* 30. And where the mandamus is applied for in behalf of a particular class, and the legislature has provided that they should be represented by a particular officer, such officer is the proper person to prosecute the writ, and to be named as relator therein. 1 *Denio,* 617; 1 *How. Pr. R.* 186.

Within what Time it should be Applied for.] There is no statutory limitation of the time within which the writ may be obtained in this State. *See* 12 *Barb.* 449. The writ, however, will not be granted where the party has slept upon his rights. Thus, the court denied a motion for a mandamus to compel the common pleas to quash an appeal after the lapse of five years from the final decision of the cause. 2 *Wend.*

256. In another case a mandamus to the common pleas, requiring them to compel a justice of the peace to amend his return, was denied, because there had been a delay of a year after the happening of the errors complained of. *Id.* 264; *and see* 2 *Johns. Cas.* 2*d ed.* 217—14, *note;* 1 *M. & Sel.* 32; 1 *B. & Ad.* 378, 380.

But it seems where the object is to enforce a substantial right by means of a mandamus, the party should be allowed the time given by statute to obtain a remedy for injuries essentially of a similar character, in the ordinary way, if that could be pursued. 12 *Barb.* 446.

The affidavits.] The application for the writ of mandamus is founded upon affidavits, stating the facts upon which the party relies, and which show that he is entitled to the relief demanded. 1 *Johns. Cas.* 134; 3 *Term R.* 575. The facts should be set forth with precision; and where the allegations in the affidavits are not so positive, that an indictment for perjury could be maintained upon them if false, the affidavits will be insufficient. 5 *Term R.* 466, 469; 2 *Johns. Cas.*, 2*d ed.* 217—62, *note.* "The affidavits should also anticipate and answer every possible objection or argument in fact which it may be expected will be urged against the claim * * * and where any strong evidence is expected, any disputable or material facts should be corroborated by one or more respectable and experienced individuals." 1 *Chit. Gen. Pr.* 808, 809; *and see* 2 *Johns. Cas.*, 2*d ed.* 217—62, *note.*

The affidavits should not be *entitled;* as, for example: "Supreme Court, Andrew Roddy *vs.* Thomas W. Hill," 1 *Wend.* 291; or, "Reuben Turner *advs.* James Haight," 2 *Johns.* 371; *and see* 2 *How. Pr. R.* 60; and the practice is still the same, in this respect, notwithstanding the Code. 7 *How. Pr. R.* 124. But where the affidavit was entitled: "Supreme Court. In the matter of John La Farge *against* The Judges of the Court of Common Pleas of Jefferson county," it was held, that this was not such an entitling of the affidavit as to bring it within the rule that an affidavit

entitled cannot be read. 6 *Cowen*, 61. For form of affidavit, see *Appendix*, No. 176.

How and where applied for.] The necessary affidavits having been prepared, the next step is to apply to the court for the mandamus. The application should be made to the Supreme Court, at special term. (*a*) *Rule* 40 *of Supreme Court*, 1858; *and see* 12 *Barb.* 219.

The application is either that a peremptory mandamus issue at once, or that an alternative mandamus issue, or for an order to show cause in the nature of an alternative mandamus, why the particular act sought to be commanded should not be performed. 10 *Wend.* 30; 3 *How. Pr. R.* 164.

A peremptory mandamus will seldom be granted in the first instance; although, where both parties are heard on the application, and there is no dispute about the facts, and the law is with the application, the court will permit the peremptory writ to issue at once. 7 *Cowen*, 526; 4 *Abb. Pr. R.* 36. And so, it will be permitted to issue at once, where it is apparent that no excuse can be given for the non-performance of the act, and the party's rights might be endangered by delay, *see* 14 *Johns.* 325; and, also, where on an order to show cause, the defendant shows cause, but not satisfactory. 12 *Wend.* 183; 6 *Cowen*, 518. And see further on the subject of the peremptory mandamus, *post*, *pp.* 300, 302.

The alternative mandamus issues in all cases where the facts on which the party relies are in dispute, or where the parties wish to review the case on appeal. The usual practice, however, is to grant an order to show cause, instead of issuing the alternative writ, 10 *Wend.* 30; especially where the application is to compel the performance of an act by a subordinate court. 9 *Wend.* 472; 2 *Johns. Cas.* 68.

The difference between the order to show cause, and an

(*a*) In the city of Buffalo, the application may also be made to the Superior Court of that city,—that court having, within that city, concurrent jurisdiction with the Supreme Court, in proceedings by mandamus. *Laws of* 1857, *vol.* 1, *p.* 752.

alternative mandamus, is stated by Harris, J., thus: "In the one case, the questions arising upon the application are discussed upon affidavits; and in the other, the questions come before the court upon the alternative mandamus, setting forth the facts upon which the application for relief is founded and the defendant's return thereto. In the former case, the questions between the parties, being heard upon affidavits merely, no formal judgment is given, and of course no writ of error can be brought. In the latter case a record is made up, and a writ of error lies as upon other judgments. The only practical difference between the two modes of proceeding is, that in the one case the decision of the court upon the application is final, while in the other case such decision may be reviewed upon error." (*a*) 3 *How. Pr. R.* 165; *and see* per Walworth, Ch., 10 *Wend.* 30, *supra*; 2 *Johns. Cas.* 2*d ed.*, 217—63, *note.* For form of order to show cause, see *Appendix*, No. 179.

Whether the writ has been granted or denied, on a motion for a peremptory mandamus, or on the return of an order to show cause, the court, on the suggestion of either party, will permit the alternative mandamus to issue to enable the question to be carried further. (*a*) 20 *Barb.* 86; 13 *How. Pr. R.* 305, 309; 10 *Wend.* 31; 12 *Id.* 183; 6 *Cowen*, 518.

The court will not determine doubtful questions on the motion or application for the writ, but will grant the mandamus that the matter may come before them on the return. See per Edmonds, J., 7 *How. Pr. R.* 293; *and see* 1 *Id.* 163.

The application for the writ is either ex parte, or upon notice to the defendant. For form of notice, see *Appendix*, No. 177. It was stated by Sutherland, J. (12 *Wend.* 292), that the court would not, in future, entertain motions for a mandamus, or a rule to show cause, unless upon notice to the

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(*a*) But now, the writ of error is abolished, and either party may appeal from the decision of the court made on the order to show cause. See *post*, under the head of "Appeals, and the proceedings therein;" and see, also, *Laws of* 1854, *p.* 592, *ante p.* 16 *note*; 19 *Barb.* 657; *s. c. on appeal*, 3 *Kernan*, 239, 241.

parties to be affected by the proceedings. But the rule, thus laid down, has not been generally followed by the courts; and the usual practice now is, to apply ex parte for the alternative mandamus, or the rule to show cause. *See* 3 *How. Pr. R.* 165. Where the application, however, is for a peremptory mandamus, in the first instance, the usual notice of motion for a special term must be served at least eight days before the first day of the court, together with copies of the papers on which the same is founded; and the motion should then be brought on in the usual way. *See* 2 *Burr. Pr.* 176; *and* 3 *How. Pr. R.* 166; *Ib.* 379; 2 *Johns. Cas.* 2*d ed.*, 217—63, *note.*

On the return of the order to show cause, or on the motion for the peremptory writ, if the opposite party appears, the relator will hold the affirmative,—thus, the relator will move for the mandamus, and after the opposite party has been heard in opposition to the motion, the relator will be at liberty to reply. 12 *Wend.* 184, *note.*

Alternative Mandamus.] If the alternative mandamus is granted, the rule authorizing it should be entered with the clerk of the court. For form, see *Appendix*, No. 178. Although, as we have seen, it would be irregular to entitle the affidavits on which the writ is allowed, yet it is otherwise with the rule granting the writ, which may properly be entitled in the cause. 2 *How. Pr. R.* 60.

The alternative writ should be *directed* to the person, body, or tribunal, who is obliged by law to execute it, or whose duty it is to do the thing required. But where it was prosecuted to compel commissioners of highways to do a certain act; it was held that it need not, in the first instance, be directed to the commissioners by their individual names, and that it was only in case of disobedience to the writ, that they were liable to be proceeded against personally. 16 *Johns.* 61. (*a*) And where it was issued to compel a cashier of a

(*a*) Whether, when the object sought, is the enforcement of a duty resting upon a board of officers in their collective capacity, the alternative mandamus

bank to submit a book to one of the directors for inspection, where he had refused to do so, and such refusal had been approved by the board of directors; it was held that the writ might properly be directed to the cashier alone; and, it seems, it would not have been improper to have directed it, also, to the directors, especially as they had had notice of the application for the writ, and several of them had shown cause against it. 12 *Wend.* 187.

If the writ is wrongly directed, as, for example, to the mayor, aldermen, and commonalty of Ripon, and the return shows that they were incorporated by the name of "the mayor, *burgesses*, and commonalty," &c., the proceedings will be irregular, and the writ will be quashed. 2 *Salk.* 443. And so the writ was quashed where it was directed to the mayor and aldermen of Hereford, to compel the admission of a person to an office, and it appeared that in fact the mayor only was to admit. *Id.* 701; *and see Id.* 699. If the writ is wrongly directed, such misdirection may be specially returned, *Id.* 434; or it may be superseded on motion, *Id.* 701; 1 *Stra.* 55; See further on the subject of direction, 2 *Johns. C.*, 2*d. ed.* 217—64, 65, *note, and the cases there cited.*

An alternative mandamus is in the nature of a rule to show cause. 10 *Wend.* 25, 30; 3 *How. Pr. R.* 165. In it the relator sets forth his title, or the facts upon which he relies for the relief sought, and the defendant is required by it to do the particular act asked for, or to show cause.

The title of the relator must be clearly and distinctly stated in the writ, and in such form that the facts alleged may be admitted or denied; and so that the defendant may at any time after a return, and before a peremptory mandamus is awarded, object a want of sufficient title in the relator to the relief sought, or show any other defect in substance. *Id. ibid.;* 2 *Comstock*, 490; 15 *Barb.* 607; 3 *How. Pr. R.* 30; 7 *Id.* 81. And it is not enough to refer in the writ to the

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is defective merely because, though addressed to all the members of the board it is addressed to them individually, instead of collectively, *quære?* 5 *Abb. Pr. R.* 241.

affidavits and other papers on file, on which the order for the mandamus was made; though, it seems, such reference will be permitted to show the amount of a sum of money claimed; but not the right of the relator thereto. 10 *Wend.* 25, *supra.* Thus, where the writ was directed to the canal commissioners, requiring them to pay to the relator certain moneys, "according to the order and certificate of the Canal Board and assignment, &c., mentioned in the affidavits on file in our Supreme Court of Judicature," &c.,—it was held defective, and that the affidavits referred to formed no part of the record, and could not, therefore, be considered by the court. 10 *Wend.* 25; *and see* 7 *Id.* 476; 15 *Barb.* 607. And so, where the writ commanded the defendants to correct an assessment, or show cause, &c., and asserted generally that injustice had been done to the relators in assessing their property, and that they had been unjustly assessed, and that the defendants had refused to correct the erroneous assessment,—it was held that those allegations were not sufficient, of themselves, to entitle the relators to relief. "They should have gone beyond that," said the court; "and stated the particulars, in order that it might be seen from them that the charge was well founded, and that the defendants might be enabled specifically to answer the complaint." 15 *Barb.* 613, *supra; and see* 2 *Johns. Cas.* 2*d ed.*, 217—66, *note.*

But where the writ is issued to compel a subordinate court to seal a bill of exceptions, it need not set forth the bill. 4 *Cowen*, 73. And if the production of records be the object of the writ, they need not be specifically described; a general description is sufficient. 1 *Sid.* 31; 3 *Steph. N. P.* 2321.

The writ should also set forth, with sufficient certainty the duty to be performed, 2 *Stra.* 897, 857; 6 *Mod.* 310; 2 *Id.* 316; especially as the peremptory writ is required to correspond with it in this respect. 1 *Hill*, 50; 12 *Barb.* 446. And it should not demand too much, otherwise judgment will be given for the defendants. 1 *Hill*, 55.

The writ should be made returnable at a special term. *See Sup. Court Rules*, 1858, *No.* 40; 12 *Barb.* 219. But an objection that it is not made returnable at the special term

will not be allowed after the return has been made. 11 *How. Pr. R.* 89. And though the writ should be made returnable at the special term, yet the court, in one case, entertained the motion for the mandamus at the general term, where the questions involved were important, and the writ had been made returnable at that term, and no objection had been made. 12 *Barb.* 219, *supra; and see* 1 *Code R.* 135. In the case last cited, the motion was heard in the first instance at the general term, notwithstanding objection was made thereto; but the rules of the Supreme Court, which then authorized such motion, have since been abrogated in that respect. *See Rule* 57, *of* 1847, *and Rule* 40, *of* 1858.

The alternative mandamus should be tested, signed, and sealed, in the usual manner. 1 *Burr. Pr. R.* 95, 97; 2 *Id.* 177. It is not process, however, within the meaning of the statute regulating the test and return of process. 13 *Wend.* 649, 655 *note;* 3 *How. Pr. R.* 164. For form of alternative mandamus, see *Appendix*, No. 180.

When, and how served.] The alternative mandamus should be served at least eight days before the day specified in the writ for showing cause. 3 *How. Pr. R.* 164.

The service is made by showing the original writ and delivering a copy thereof. 4 *Cowen*, 73, 403; 1 *Johns.* 64. When directed to the judges of an inferior court, service may be made in term time or in vacation, *Id. ibid.;* 7 *Wend.* 536; though where the application is to compel an inferior court to try a cause, service should be made in term. 1 *How. Pr. R.* 114. When directed to a county court, service upon such of the judges as are sitting in open court, is sufficient. 1 *Call.* 562.

Amendment of Writ.] If there are any irregularities in the writ, it may be amended at any time before it is returnable. *Bac. Abr., Mandamus, B.;* 6 *Mod.* 133; *Doug.* 135; 5 *Abb. Pr. R.* 241. But an amendment will not be permitted after the return, especially if the return has been traversed. 4 *Term*, 690. See also on the subject of amendments, 2 *R.*

S., 424, *title* 5, the provisions of which are made applicable to writs of mandamus. *Id. sec.* 10.

Under the English practice, the amendment is made by a judge's order. 2 *Johns. Cas.* 2*d ed.* 217—67, *note, citing* 1 *Gude Cr. Pr.* 193; 3 *Steph. N. P.* 2325. If there is a mistake in the writ, the prosecutor may quash it, and have a new one before it is returned. *Id.*

Motion to quash or to set aside the Writ.] After the alternative writ is served, the defendant may move the court to quash or to set the same aside. 4 *Cowen*, 73. The motion is founded upon some irregularity in the issuing of the writ, 19 *Wend.* 67; or upon defects in the form or substance of the writ. 10 *Id.* 25; 1 *How. Pr. R.* 186; 1 *Stra.* 55; 2 *Salk.* 699; *Id.* 701.

The motion should be made before the return to the writ, except in cases of defects of substance, which may be taken advantage of at any time before the peremptory mandamus is awarded. 10 *Wend.* 31, *and cases there cited; and see* 2 *Coms.* 492; 14 *Barb.* 52; 11 *How. Pr. R.* 89; 2 *Johns. Cas.* 2*d ed.*, 217—67, 68, *notes.*

The motion to quash is in the nature of a demurrer, and admits the facts recited in the writ. 7 *How. Pr. R.* 290.

Proceedings if Return is not made.] The party to whom the alternative writ is directed, is required to make return thereto, and for a neglect so to do such party may be proceeded against by attachment, as for a contempt, in the manner prescribed in the thirteenth title (2 *R. S.* 534), of chapter eight of part third of the Revised Statutes. 2 *R. S.* 586, *sec.* 54 (*a*).

Where the mandamus is directed to a corporation, to do a corporate act, and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to it; but where it is directed to several persons in their natural capacity, the attachment must issue

(*a*) See the subject of Contempts in Chapter XI. *post.*

against all, though when they are before the court the punishment will be proportioned to their offense. 2 *Johns. Cas.* 2*d ed.* 217—69, *note, citing Hil.* 8 *Geo. II; Bul. N. P.* 201; 1 *Gude Cr. Pr.* 189; 2 *Salk.* 429.

If the writ be directed to a "town council," and they adjourn the corporate assembly in order to prevent the return being made, the members will be punishable for contempt. *Id. ibid.;* 10 *Mod.* 56.

Further Time to make Return.] If the defendant desires further time in which to make a return he may apply to the Supreme Court, or to a justice thereof, for an order enlarging the time, the same as in personal actions. 2 *R. S.* 587, *sec.* 59; 1 *Johns.* 64; 4 *Cowen*, 73, 403; 1 *Barb. S. C. R.* 558; *Sup. Court Rules, No.* 22.

The Return.] The person, body, or tribunal to whom the alternative mandamus is directed and delivered, is required to make return thereto, 2 *R. S.* 586, *sec.* 54; 2 *Johns. Cas.* 2*d ed.* 217—69, *note, and cases there cited;* and he cannot demur to the writ. 6 *Abb. Pr. R.* 30. But no return is necessary where the writ has been quashed; nor where the defendant concludes to put an end to the controversy by performing the act required. 10 *Wend.* 31. The return should be made within the time mentioned in the writ, or within the time allowed by the order enlarging the time, if such order be obtained. 2 *R. S.* 586, *sec.* 59. And it is no excuse for not making the return that the writ has not been returned and filed. 4 *Cowen*, 73, 76, 403.

The return should deny the facts stated in the writ, on which the claim of the relator is founded, or show other facts in law sufficient to defeat the relator's claim. 10 *Wend.* 25; 14 *Barb.* 52; 11 *How. Pr. R.* 89. Facts should be alleged in it, and not the evidence from which those facts are inferred. 10 *Wend.* 32; 2 *Coms.* 496. It should be positive and certain, *Ib.;* 1 *L'd Raymond*, 559; and not argumentative, *Id.; Doug.* 158; 5 *Term R.* 66; 6 *Mod.* 309; nor evasive, 1 *Barb. S. C. R.* 34. Several matters may be returned, but they

should be consistent; for if they are inconsistent the whole will be quashed, because the court will not know which to believe. 2 *Salk.* 436. But if the return consists of several independent matters not inconsistent with each other, some of which are good, in law, and some bad, the court may quash the return as to such as are bad, and put the relator to plead to or traverse the rest. 2 *Term R.* 456; 5 *Id.* 66; 6 *Id.* 493. But certainty to a common intent will, in general, be sufficient; and the court will not intend inconsistent facts for the purpose of making it bad. *Doug.* 159; 2 *Salk.* 431.

An allegation in a return that the law under which the relief is claimed is unconstitutional and void, is not a fact, but an averment of a principle of law, which will be struck out on motion. 11 *How. Pr. R.* 89. And so, if the return contains anything more than a full answer to the substantial averments in the writ, it will be rejected as surplusage, or struck out on motion. 2 *Coms.* 496.

The court may receive a return without a verification, 1 *Sid.* 227; or they may require such verification. *Pol.* 455; *Ld. Raym.* 365. The return need not be signed, by or on behalf of the party making it; and if it be made by a corporation, it need not be signed nor sealed. 2 *Johns. Cas.* 2*d ed.*, 217—74, *note*, *citing* 1 *Salk.* 192; *Skin.* 368; *Com. Dig. Man.* 2; *and see* 1 *Ld. Raym.* 223.

See further, on the subject of returns to writs of mandamus, 2 *Johns. Cas.* 2*d ed.*, 217—69 *to* 74, *notes;* and for form of return, see *Appendix*, No. 181.

Amendment of Return.] The defendant having made and filed a return, may desire to amend it. But amendments will be allowed with caution. In one case the court, after a verdict on the traverse to a return, refused to allow the defendants to amend the return by setting forth a different constitution of the corporation. 7 *Term R.* 699; *and see* 2 *Johns. Cas.* 2*d ed.*, 217—74. Clerical mistakes may be amended after the return is filed. *Id.; Doug.* 135.

Motion for a further Return.] If the return made by

the defendant is thought by the relator to be evasive, or otherwise insufficient, he may apply to the court for a further or supplementary return. 9 *Wend.* 429, 430; 7 *Id.* 475. But where a motion is made for a further return of additional facts, the motion will be denied, unless such additional facts are set forth in the alternative writ. 3 *How. Pr. R.* 30.

Motion to Quash and to Strike out Return.] If the return be defective upon its face, as, if several matters be returned which are inconsistent, the relator may apply to the court to quash it, 2 *Salk.* 436; 4 *Burr.* 2041; *Cowp.* 413; and it may be quashed as to part. 2 *Term R.* 456; 5 *Id.* 56; 6 *Id.* 493.

And so, if the return contain anything more than a full answer to the substantial averments in the writ, the improper matter will be rejected as surplusage, or struck out on motion. 2 *Coms.* 496. And in like manner if a portion of the return is alleged to be immaterial or argumentative, it will be struck out. 11 *How. Pr. R.* 89; 8 *Id.* 358. A demurrer in such cases, would be improper. *Id. ibid.*; 4 *Coms.* 496.

Notice requiring Relator to Demur or Plead to Return.] The return to the writ of mandamus having been filed, the party making such return may serve a notice upon the relator requiring him to demur or plead thereto within twenty days after such service. (*a*) *Sup. Court Rules*, 1858, *No.* 51. For form of notice, see *Appendix*, No. 182.

(*a*) The rule recently adopted by the Supreme Court, in respect to proceedings upon mandamus and prohibition, is a material alteration of the practice in such cases. The late rules provided that "the return to a writ of mandamus or of prohibition, where such return shall be adopted by the party, having been filed, a rule may be entered requiring the relator to demur or plead thereto in twenty days after notice of the rule, or to move at the next special term thereafter, for such rule as he may require; and in case of default, on filing an affidavit showing such default, a rule may be entered dismissing such writ and all subsequent proceedings, with costs." *Sup. Court Rules*, 1856, *No.* 43; *and see Rules of* 1847, *No.* 75; 10 *Wend.* 632.

The pleadings in mandamus are the same as under the former system of pleading; and the rules prescribed by the Code of Procedure have no application to them. *Code*, § 471; 16 *How. Pr. R.*, 4; *s. c.* 5 *Abb. Pr. R.* 372; *and see* 6 *How. Pr. R.* 179; *Ib.* 319.

Proceedings if Relator does not Demur or Plead.] If no plea or demurrer to the return is interposed, within the time required, either party may notice the matter for a hearing at the next or any subsequent special term; at which the same may, according to the practice of the court, be heard as a non-enumerated motion; and the same shall be heard and disposed of on the said return. *Sup. Court Rules*, No. 51, *supra*. For form of notice of hearing, see *Appendix*, No. 183.

The relator having failed to demur or plead to the return within the time required, the facts alleged in the return are thereby admitted to be true, and the case will be determined by the court the same as if he had formally demurred to such return. *See* 6 *Wend.* 559, 560; 7 *Id.* 475; 10 *Id.* 632; 1 *Barb. S. C. R.* 379, 384.

Demurrer, Plea, &c.] At the common law, the relator was not permitted to traverse the return, notwithstanding that it might be false in fact; but the remedy was either by an action on the case for a false return, or if the matter concerned the public, by indictment against the person making the return. 2 *Johns. Cas.* 2*d ed.* 217—75, *note*.

But the statute has changed the common law in this respect, and it is now provided that whenever a return shall be made to any writ of mandamus, the party prosecuting such writ may demur or plead to all or any of the material facts contained in the return, to which the person making such return, shall reply, take issue or demur; and the like proceedings shall be had therein for the determination thereof, as might have been had, if the person prosecuting such writ had brought his action on the case for a false return. 2 *R. S.* 586, *sec.* 55; 10 *Wend.* 32; 3 *How. Pr. R.* 380. A similar statutory provision also existed previous to the Revised Statutes. 1 *R. L.* 107, *sec.* 2; 14 *Johns. R.* 61.

The practice under the above provision of the Revised Statutes is stated by Sutherland, J., thus: "Although these statutes contemplate formal written pleadings in the ordinary mode of conducting suits, the practice of the court is virtually to allow pleadings *ore tenus;* that is, the relator is permitted

to discuss the return, and to ask for a peremptory mandamus, and whilst he does not put in a *formal demurrer*, the case is considered as embraced in the description of *non-enumerated* business, and is heard as such; but if a formal demurrer is interposed, it becomes *enumerated* business, and can be heard only at the stated terms. It is optional with a relator whether it shall be considered *enumerated* or *non-enumerated* business, unless the court specially direct formal pleadings to be interposed. No injury can result to the defendant in consequence of this privilege allowed the relator, for if he wishes to carry up the cause for review, the court permits him, after its decision, to make up and file formal pleadings, so that a record may be made up; which privilege, however, is not granted to the relator, who has chosen to ask for a peremptory mandamus, without formally demurring; if dissatisfied with the decision of the court, *he* cannot carry up the cause for review." (*a*) 6 *Wend.* 559, 560; 10 *Id.* 632; and see, also, to the same effect, per Nelson, J., 7 *Id.* 475; and per Welles, J., 1 *Barb. S. C. R.* 379, 384.

But although the relator may demur or plead to the return, yet he cannot do both. 1 *Wend.* 38. The court will not permit him to dissect the return into as many parts as he sees fit, plead to some portions and demur to the residue. *Ib.* And where the return alleges several material facts, the relator in pleading to it, need not deny all of the facts; but he may deny any one or more of them, and omit to plead to the others, in which case the facts not denied will be taken as true. 3 *How. Pr. R.* 381; 16 *Mod.* 174.

Where portions of the return are alleged to be immaterial or argumentative, the relator's remedy is not by demurrer, but by motion to strike out. 2 *Coms.* 496; 11 *How. Pr. R.* 89.

(*a*) But the practice is no doubt changed, with respect to the right of the relator to have the case reviewed notwithstanding he has not formally demurred to the return. Such review may now be had by appeal. *Laws of* 1854, *p.* 592, *ante, p.* 16 *note;* 19 *Barb.* 657; *Code of Pro.* § 11, *sub.* 3. *First Rep. of Com. on Code, p.* 11 *to* 20; and see *post,* under the head of "Appeals."

Nor will the relator be permitted to demur specially to the return; so held where the mandamus was directed to a subordinate court, to compel them to sign and seal a bill of exceptions, and the judges returned that they refused to seal the bill unless the same should contain all the evidence relating to the matters of law therein excepted to, and which they alleged the bill did not contain, and to which return the relator demurred, specially, that it was not alleged in the return that the bill did not contain all the evidence material and necessary to present the question of law raised by the bill. 9 *Wend.* 429. And per Sutherland, J., in that case: "This court will not permit subordinate tribunals to be harrassed with special demurrers to returns made by them. If the relator is dissatisfied with a return made, conceiving it to be evasive, or the construction of any matters alleged in it to be of doubtful character, upon suggestion of its insufficiency, a further or supplementary return will be ordered, and thus the rights of a party as effectually protected as if permitted to demur specially." *Ib.* 430.

If the parties desire further time in which to demur, plead, &c., it may be obtained on application to the court or to a justice thereof, the same as in personal actions. 2 *R. S.* 587, *sec.* 59.

Issue of Law, and Proceedings thereon.] If the relator demurs to the return, or the defendant demurs to the plea put in to the return, the facts alleged in such return, or such plea, are thereby admitted to be true; and the question becomes one of law, and should be put upon the calendar and brought on for argument as in personal actions. And so, it is substantially an issue of law where the relator, without formally demurring to the return, applies to the court for a peremptory mandamus, notwithstanding the return. In such case also, the facts set forth in the return are admitted to be true, and the question is one of law, whether, from the facts admitted, a mandamus should be awarded. 7 *Wend.* 475; and see also, 6 *Id.* 559; 10 *Id.*

632; and 1 *Barb. S. C. R.* 379; *Sup. Court Rules*, 1858, *No.* 51.

Issue of Fact and Proceedings thereon.] If the facts in the return are denied, or an issue of fact exists in any other way, on the pleadings, the case must go down to the circuit for trial. 7 *Wend.* 475, *supra.*

Issues of fact are to be tried in the county within which the material facts contained in the mandamus shall be alleged to have taken place. 2 *R. S.* 586, *sec.* 56.

The case is prepared and brought on for trial, the same as in personal actions.

Allegations in the return, which are denied by the relator, in his plea, and not proved, are not to be taken as true on the trial. 12 *How. Pr. R.* 51. Though where the relator, instead of demurring to the return, put in a plea, taking issue upon all the material allegations in the return,—it was held that he thereby admitted that, upon its face, the return was a sufficient answer to the case made by the alternative writ. 24 *Barb.* 341. The relator, holding the affirmative of the issue, the return is to be taken as true, until it is falsified upon the trial. *Ib.* 348.

Damages.] In case a verdict be found for the relator, or judgment be given for him upon demurrer, or by default, he shall recover damages and costs, in like manner as he might have done if he had brought his action on the case for a false return. 2 *R. S.* 587, *sec.* 57.

The damages are either assessed by the jury on the trial of the issues of fact joined, or if the judgment be by default, or on demurrer, they are assessed on a writ of inquiry, as in personal actions. See 2 *Burr. Pr.* 179.

A recovery of damages under the statutory provision last cited, against any party who shall have made a return, is a bar to any other action against such party, for making such return. 2 *R. S.* 587, *sec.* 58.

Judgment and Execution.] Judgment is entered on the

decision of the court, or the verdict of the jury, as in personal actions. But, it seems, a peremptory mandamus will not be awarded after verdict or judgment by default, without notice to the defendant and motion to the court for that purpose. 3 *How. Pr.* 379, 382, per Barculo, J. Nor can judgment for costs, in such case, be entered, except by the special order of the court. *Ib.;* and see *post, p.* 303, "Costs."

If a party has judgment for costs, or for damages and costs, execution issues for the same, as in personal actions. For form of judgment record, see *Appendix*, No. 184.

Peremptory Mandamus, and how Obtained.] If a verdict, on the trial of an issue of fact, be found for the relator, or judgment be rendered for him upon demurrer or by default, a peremptory mandamus is directed by the statute to be granted to him without delay. 2 *R. S.* 587, *sec.* 57. This language of the statute would seem to authorize the peremptory writ to issue immediately on default, or on the decision by verdict or upon demurrer. But see 3 *How. Pr. R.* 380, 382, where the practice in cases of mandamus on issue and verdict, or judgment by default, is stated by Barculo, J., thus: "After the facts of the case are settled, either by an issue and verdict, or by default of one of the parties, the relator, to obtain a peremptory mandamus, must move the court on notice to the opposite party, upon the return, pleadings, verdict, &c.; when the court can, in view of the whole case, pronounce upon the rights of the respective parties."

The relator may, also, on the coming in of the return, without formally demurring or pleading to the same, apply to the court, on notice, for the peremptory mandamus. In such case, the facts alleged in the return are admitted to be true; and the question is one of law, whether upon the facts admitted, the relator is entitled to the peremptory mandamus. 6 *Wend.* 559; 7 *Id.* 475; 10 *Id.* 632; 1 *Barb. S. C. R.* 379; *Sup. Court Rules*, 1858, *No.* 51. If the court determine, on such motion, that the return is insufficient, and the relator is otherwise entitled to the relief sought, a peremptory mandamus will be awarded. *Id. ibid.* The papers on which the

alternative mandamus is granted, should be presented to the court on the hearing of the motion, for the purpose of apprising the court of the purport and intent of the proceedings, but not to affect the matters contained in the return. 7 *Wend.* 476; 10 *Id.* 30, 31. And the relator should state in writing the points relied upon in support of the application. 2 *Id.* 255.

Where both the parties are heard on the application for the alternative writ, and there is no dispute about the facts, and the law is with the application, the peremptory mandamus will issue in the first instance. 7 *Cowen*, 526; 4 *Abb. Pr. R.* 36. And it will issue in the first instance where it is apparent that no excuse can be given for the non-performance of the act complained of, and the relator's rights might be endangered by delay. See 14 *Johns.* 325. And so where the defendant on the application for the alternative writ, shows cause against it, but not satisfactory, the peremptory writ will be granted. 12 *Wend.* 183; 6 *Cowen*, 518. But in such case, on suggestion that the defendant wishes to bring error, the court will change the rule into one for an alternative mandamus, so that the facts may be put on record by a return. *Id. Ibid.;* but see *ante, p.* 287, *note.*

And where the alternative writ has been regularly served, the court may in their discretion, upon due proof of such service, order a peremptory mandamus, without compelling a return. 1 *Johns.* 64. If, however, the defendants have not had time to prepare a return, the court will extend the time for that purpose, before permitting the peremptory writ to issue. 4 *Cowen*, 73; *Ib.* 403.

And so the peremptory writ will be awarded where the return is insufficient. 7 *Johns.* 549; 6 *Cowen*, 579. So if it is evasive. 1 *Barb. S. C. R.* 34.

The peremptory mandamus must correspond with the alternative writ in respect to the thing required to be performed. 1 *Hill*, 50; 12 *Barb.* 446.

If the peremptory writ is awarded, an order to that effect should be entered with the clerk. And if costs are granted,

their allowance should be inserted in the order awarding the peremptory mandamus. See *post*, "Costs."

After the court has awarded the peremptory mandamus, there is no power to stay the proceedings upon it, 2 *Barb. S. C. R.* 555; though it would be otherwise upon appeal from the order granting it. *Laws of* 1854, *p.* 592, *ante*, *p.* 19.

See further on the subject of the peremptory mandamus, 2 *Johns. Cas. 2d ed.* 217—78, *note; Bac. Abr., Mandamus, M;* and for form of peremptory writ, see *Appendix*, No. 185.

Where and How Motion for Peremptory Writ brought on.] The motion for the peremptory mandamus, where it is founded upon the return, and the relator has not formally demurred, is a non-enumerated motion, and is brought on the same as other non-enumerated motions. 6 *Wend.* 559; 7 *Id.* 474; 10 *Id.* 632; 1 *Barb. S. C. R.* 379; *Sup. Court Rules*, 1858, *No.* 51. If there is a demurrer to the return, or an issue of law upon the pleadings, the case is put upon the calendar as an enumerated motion, and brought on for argument in the usual manner. *Id. Ibid.* In either case it should be noticed for the special term, *Sup. Court Rules*, 1849, *No.* 31; *Ib.* 1858, *No.* 40; 10 *How. Pr. R.* 353; 1 *Abb. Pr. R.* 460; 1 *Code R., N. S.* 338; though, formerly, upon demurrer to the return, or on issue of law upon the pleadings, the argument was brought on at the general term. 1 *Barb. S. C. R.* 384; 2 *Id.* 557; 6 *Wend.* 559, 560; 7 *Id.* 475.

It is optional with the relator whether the motion shall be considered enumerated or non-enumerated business, unless the court specially direct formal pleadings to be interposed; if he elect to have it considered non-enumerated, the court, on the application of the defendant, after its decision of the question, will permit formal pleadings to be made up and filed, and the defendant may thereupon have the judgment reviewed on appeal, the same as in actions, *Id. ibid.;* or either party may now appeal from the decision of the court as from a final order, without making up a formal record of judgment. *Laws of* 1854, *p.* 592, *ante*, *p.* 19; 19 *Barb.* 657;

Code of Pro. sec. 11, *sub.* 3. *First Rep. of Com. on Code, p.* 11 *to* 20; 9 *How. Pr. R.* 304; *s. c.* 3 *Duer*, 616; though formerly, the relator, by moving upon the return, lost the right to have the decision reviewed, if adverse to him. 13 *Wend.* 130; 23 *Id.* 648, and see *post*, "Appeals and proceedings therein."

Disobedience of Mandamus, and Proceedings thereon.] The mode of enforcing obedience to the peremptory writ of mandamus, is by attachment, founded upon affidavits showing that the peremptory writ has not been obeyed, and that it was duly served upon the proper parties. 2 *Caines*, 97. Where the affidavit showed that the defendant had kept out of the way, so that personal service of the peremptory writ could not be made upon him, and that the writ had been left at his house, the court ordered him to show cause. 12 *Mod.* 312; *and see* 2 *Johns. Cas. 2d ed.* 217—79, *note.*

Whenever the peremptory writ shall be directed to any public officer, body, or board, commanding them to perform any public duty specially enjoined upon them by any provisions of law, if it shall appear to the court that such officer, or any member of such body or board, has, without just excuse, refused or neglected to perform the duty so enjoined, the court may impose a fine not exceeding two hundred and fifty dollars, upon every such officer or member of such body or board; and such fine, when collected, shall be paid into the treasury. And the payment of such fine, shall be a bar to any action for any penalty incurred by such officer or member of such body or board, by reason of his refusal or neglect to perform the duty so enjoined. 2 *R. S.* 587, *sec.* 60.

Costs.] In suits and proceedings upon writs of mandamus, and on appeals therein, the court may, in its discretion, award or refuse costs to any party therein. *Laws of* 1833, *p.* 395, *sec.* 6; *Laws of* 1854, *p.* 592, *sec.* 3, *ante*, *p.* 19; 19 *Barb.* 657; 6 *Abb. Pr. R.* 30.

Under the authority here given, the court will award or refuse costs, as the equity and justice of each particular case

may require. 1 *Barb. S. C. R.* 557. And costs will not be allowed to be entered against a party unless by the special order of the court. *Ib.;* 3 *How. Pr. R.* 380. Where a rule for a peremptory mandamus is obtained by default, and such rule is silent as to costs, and there is no evidence to show that the court intended to grant costs to the relator, such rule will not be amended so as to provide for the payment of costs. 1 *Barb. supra.*

In addition to the above statutory provisions, it is also provided by statute, that upon refusing an alternative or a peremptory mandamus, the court may award costs to be paid by the party applying for such mandamus. 2 *R. S.* 619, *sec.* 40. And whenever a peremptory mandamus shall be granted upon the coming in of a return to a previous mandamus, without any issue of fact or of law being joined upon such return, the court shall award costs to the relator in the same manner as if such peremptory mandamus had been awarded upon a judgment on demurrer to such return, unless it shall appear on such return that there was some reasonable excuse for not having done the act required. *Ib. sec.* 41.

The statutory provisions, last cited, do not authorize costs to be awarded to the relator, except in those cases where a peremptory mandamus shall be ordered *upon the coming in of a return to a previous writ,* 10 *Wend.* 598; 1 *Barb. S. C. R.* 559; nor do those provisions affect the rule above laid down, that costs are in all cases to be granted or refused in the discretion of the court. Costs may be granted, therefore, notwithstanding that no return has been made, and there has been no appearance on the part of the defendant. *Id. ibid.*

In awarding a peremptory mandamus against judges or other public officers entrusted with the discharge of judicial duties, the practice of the court is not to grant costs against them, *Anon.* 19 *Wend.* 157; 2 *Id.* 301, 303; 5 *Abb. Pr. R.* 232; though where the judges, instead of obeying the alternative writ, make a return thereto, and on the coming in of the return, the peremptory mandamus is awarded, the relator will be entitled to the costs of the proceedings. 18 *Wend.* 534; "The judges," says Bronson, J., "may always protect them-

selves against costs, by obeying the alternative writ. Where they omit to do so and make return, it may be presumed that they are indemnified against costs by the party in interest." *Ib.* 537; *and see* 10 *Id.* 598.

And where a party who is not the defendant in the writ, though the real party in interest, resists a mandamus by requiring the relators to plead or demur, and subsequently joins in demurrer, he is liable for the costs on judgment being rendered in favor of the relators. 3 *Wend.* 304. But it would be otherwise, if he had not appeared in the proceedings, or done some other affirmative act, substantially bringing him in as a party to the suit. And it would not be sufficient to make him liable for the costs that the return was made at his request, and that he opposed the issuing of the peremptory mandamus. 2 *Id.* 301, 303; *and see* 2 *Johns. Cas.* 2*d ed.* 217—80, *note.*

The costs of the motion on the original application for the mandamus, will also be awarded or not in the discretion of the court. *See Rev. Notes*, 3 *R. S.* 2*d ed.* 779; 1 *Barb. S. C. R.* 557. Where the notice of motion asked for costs, and the motion was denied, costs were given against the relator for that reason. 1 *How. Pr. R.* 222. And although the court may grant costs against the relator, if the motion is denied (2 *R. S.* 619, *sec.* 40, *supra*), yet the general practice on denying motions for the mandamus, has been not to give costs, especially where the motion is ex parte. 4 *Cowen*, 548. But where notice of the motion is given to the defendant, which he opposes, and the law is plainly against the relator, the motion will be denied, with costs. *Ib.; and see* 2 *Johns. Cas.* 2*d ed.*, 217—80, *note.*

If the relator removes from the State intermediate the issuing of the alternative and peremptory writ, the defendant will be entitled to security for costs, and the proceedings will be stayed until such security be filed. 18 *Wend.* 652.

When costs are granted, they are to be at the rate allowed for similar services in civil actions. *Laws of* 1854, *ante, p.* 19, *sec.* 3; 19 *Barb.* 657.

Motion to set Aside the Proceedings.] If the peremptory mandamus has been unfairly or improperly obtained, the defendant may apply on motion at the special term to set the same aside. 1 *Caines*, 8; 2 *Barb. S. C. R.* 557.

Appeals.] The proceeding to obtain a review of a decision granting or refusing a mandamus, was formerly had by writ of error. And the writ of error was allowed only upon final judgment rendered after issue joined upon plea or demurrer, interposed on the coming in of the alternative mandamus. (*a*) Thus, on a motion for a peremptory mandamus, in the first instance, or for a peremptory mandamus on the return of an order to show cause, the decision on such application was not the subject of review. 3 *How. Pr. R.* 165; 10 *Wend.* 30; 2 *Johns. Cas.* 2*d ed.* 217—63, *note.* Though, to enable the question to be carried further, the court, on the suggestion of either party, permitted the alternative mandamus to issue and a formal record to be made up, on which the party dissatisfied with the decision might have the case reviewed by writ of error. 12 *Wend.* 183; 10 *Id.* 31; 6 *Cowen*, 518; 20 *Barb.* 86; 13 *How. Pr. R.* 305, 309.

Again, where the relator moved on the return to an alternative mandamus, for the peremptory writ, notwithstanding the return, the facts alleged in such return were thereby admitted to be true, and the case was to be determined by the court the same as if the relator had formally demurred to the return. 6 *Wend.* 559, 560; 7 *Id.* 475; 10 *Id.* 632; 1 *Barb. S. C. R.* 379, 384. In such case, neither party was at liberty to have the decision of the court reviewed; though the practice was, where the decision was adverse to the defendant, to permit him to make up a formal record of judgment, on which the decision of the court could be reviewed by writ of error.

(*a*) The only exception to this was in the case of a contest between the State and individuals, relating to water privileges, &c., on the canal, where, by the statute, a writ of error was allowed to be brought from the decision of the court, notwithstanding no pleadings were had or issue joined in the cause. 1 *R. S.* 235, *sec.* 97; 10 *Wend.* 30.

Id. ibid.; 13 *Wend.* 130; 23 *Id.* 648. But this privilege was not allowed to the relator; if the decision was adverse to him, it was final. He chose to ask for the peremptory mandamus, without formally demurring, and by doing so, deprived himself of the right to have the case reviewed. *Id. ibid.*

But the practice has been essentially changed. Now, the only mode by which the decision of the court can be reviewed, is by appeal. And either party may now have the order of the court, granting or refusing a mandamus, reviewed on appeal, in all cases, whether the order is made on the original application for the peremptory mandamus in the first instance, or on the application for the peremptory writ on the return of an order to show cause, or on the application for the peremptory writ, after a return has been put in to the alternative mandamus, without formally demurring or pleading to such return. *Laws of* 1854, *p.* 592, *ante p.* 19; 19 *Barb.* 657; *Code of Pro.* §§ 8, 11, 333, 471; 9 *How. Pr. R.* 304, per Duer, J.; *s. c.* 3 *Duer*, 616. And an appeal may also be taken from the final judgment, after issue joined upon plea or demurrer, interposed on the return of the alternative mandamus. *See* 20 *Barb.* 86; 13 *How. Pr. R.* 305, 309; 1 *Kern.* 563; 3 *Id.* 239.

From the order or judgment of the court at the special term, the appeal is to be taken to the general term. *Laws of* 1854, *p.* 592, *ante, p.* 19; 19 *Barb.* 657. The practice, in such case, is regulated in part by the Code of Procedure; sections three hundred and twenty-seven, three hundred and twenty-nine, three hundred and thirty, and three hundred and thirty-two, of which, apply to the proceedings on such appeal. *Ib.* (*a*) In other respects, the usual practice on appeals from orders and judgments in civil actions, is to apply, so far as the same is applicable. (*b*)

(*a*) See the act of 1854, and the sections of the Code referred to, *ante, p.* 16. *note.*

(*b*) By § 471 of the Code of Procedure, it is provided that "the *second* part of this act shall not affect proceedings upon mandamus," &c. The terms,

The appeal to the general term does not stay the proceedings unless the court or a justice thereof so order. If an order staying the proceedings is obtained, it may be upon such terms as to security or otherwise, as may be just; such security not to exceed the amount required on an appeal to the Court of Appeals. *Laws of* 1854, *ante*, *p.* 19.

An appeal may also be taken to the Court of Appeals from the order or judgment of the general term. *Code of Pro.* § 11; *First Rep. of Com. on the Code*, *p.* 11 *to* 20; *Laws of* 1857, *vol.* 1, *p.* 753. The practice, in such cases is regulated by the Code of Procedure, and is substantially the same as in appeals from orders and judgments in civil actions. *Id. ibid.*; *Code of Pro.* §§ 8 *and* 333; and *see* 9 *How. Pr. R.* 304, 311, per Duer, J.; *s. c.* 3 *Duer*, 616; 1 *Kernan*, 52; *Id.* 277; 2 *Id.* 406, 409.

"proceedings upon mandamus," are no doubt to be construed to mean the several steps taken from the commencement of the proceedings to the decision of the court on the application for the peremptory mandamus; thus leaving the Code of Procedure to apply to appeals in such proceedings, in all cases, except where otherwise provided. *See Code of Pro.* §§ 8, 11, 333, 323, 457, 471; 9 *How. Pr. R.* 304, 311; *s. c.* 3 *Duer*, 616; 2 *Sand. S. C. R.* 740; 6 *How. Pr. R.* 179; *Ib.* 319; *and see ante*, *p.* 16, *note.*

SECTION II.

PROHIBITION.

THE writ of *Mandamus*, as we have seen, is issued to *compel* the *performance* of public duties on the part of subordinate *courts* and *corporations* and *ministerial officers*. The writ of *Prohibition*, on the contrary, is issued to *forbid* or *prohibit* a *court* and *party* to whom it is directed *from proceeding* in a suit or matter depending before such court, upon the suggestion that the cognizance of such suit or matter does not belong to it. 2 *R. S.* 587; 3 *Steph. Com.* 685; *Bac. Abr.*, *Prohibition.*

The Supreme Court is the only court having authority to issue the writ of prohibition in this State. (*a*) 2 *R. S.* 587, *sec.* 61. In England, however, it issues in some cases out of the Court of Chancery, the Common Pleas, and the Exchequer; though usually out of the court of King's (or Queen's) Bench. 3 *Bl. Com.* 112; *Bac. Abr.*, *Prohibition*, *A.*

The writ is directed to *inferior courts* of *judicature*, whether such courts be temporal, ecclesiastical, maritime, military, &c.; and to the *party* whose suit or proceeding is sought to be restrained. *Id. ibid.*

When the Writ Issues.] The office of the writ of prohibition is to prevent *courts* from going beyond their *jurisdiction* in the exercise of *judicial* power, 2 *Hill*, 367; 1 *Id.* 201; 7 *Wend.* 518; and it stays both the *court* and the *party* from proceeding in the matter. *Ib.* Thus, it has been issued to prohibit a court of sessions from proceeding with an

(*a*) In the city of Buffalo, however, the application may also be made to the Superior Court of that city,—that court having, within that city, concurrent jurisdiction with the Supreme Court, to issue the writ. *Laws of* 1857, *vol.* 1, *p.* 752.

appeal in a bastardy case where they had no jurisdiction to entertain such appeal. 19 *Wend.* 154.

The court may grant or deny the writ in its *discretion;* and it seems that it ought not to issue where the party has a complete and adequate remedy in some other and more ordinary form. 2 *Hill*, 367.

Nor will the writ issue to restrain a *ministerial officer*, (*e. g.*—a collector of taxes), from the execution of process in his hands, 1 *Hill*, 196; nor to prevent an inferior court from issuing an execution; for this is a ministerial act, 2 *Id.* 367; nor to stay a corporation in the execution of a naked statute power, ministerial in its nature, *Ib.* 15; nor to bring under review the proceedings of an inferior court on the ground of their being erroneous merely. *Ib.* 363; 7 *Wend.* 518. Nor will the writ be awarded in reference to a mere point of practice, where the court has jurisdiction of the general subject of the cause. 12 *Ad. & El.* 201; 3 *Steph. Com.* 686, *note.*

Application for the Writ.] The writ should be applied for upon affidavits, by motion, at the special term, in the same manner as writs of mandamus. 2 *R. S.* 587, *sec.* 61. As to the practice in cases of mandamus, see *ante*, *p.* 284. For form of notice and affidavit, see *Appendix*, Nos. 186, 187.

The affidavits should set forth, plainly and distinctly, the facts upon which the party relies to show that he is entitled to the relief demanded. If the facts alleged in the affidavits appear to the court to be sufficient, the writ will be directed to be issued, 2 *R. S.* 587, *sec.* 61; and the rule authorizing it should be entered with the clerk of the court. For form of rule, see *Appendix*, No. 188.

The Writ, and how Directed.] The writ should be directed to the *court*, and also to the *party* whose proceedings are sought to be stayed; and after reciting or suggesting the facts and proceedings on which it is founded, should command them to desist and refrain from any further proceedings in the suit or matter specified therein, until the next term of

the court, and the further order of such court thereon, and then to show cause why they should not be absolutely restrained from any further proceedings in such suit or matter. 2 *R. S.* 587, *sec.* 61.

It should be tested, signed, and sealed, as in cases of mandamus. Like mandamus, also, it should be made returnable at the special term. (*a*) For form of writ, see *Appendix*, No. 189.

Service of the Writ.] The writ must be served upon the court and party to whom it is directed, in the same manner as a writ of mandamus. (*b*) 2 *R. S.* 587, *sec.* 62.

Return.] The statute also requires a return to be made by the court, in the same manner as returns in mandamus. (*c*) For any neglect to make such return such court may be proceeded against by attachment as for a contempt, in the manner prescribed in the thirteenth title (2 *R. S.* 534), of chapter eight, of part third of the Revised Statutes. 2 *R. S.* 587, *sec.* 62. For form, see *Appendix*, No. 190.

Notice requiring Relator to Demur or Plead to the Return.] The return to the writ of prohibition having been filed, the party making such return may serve a notice upon the relator, requiring him to demur or plead thereto within twenty days after such service. (*d*) *Sup. Court Rules*, 1858, *No.* 51. For form of notice, see *Appendix*, No. 191.

Proceedings if Relator does not Demur or Plead.] If no plea or demurrer to the return is interposed, within the time required, either party may notice the matter for a hearing at the next or any subsequent special term, at which the same may, according to the practice of the court, be heard as a non-enumerated motion, and the same shall be heard and disposed of on the said return (*d*) *Sup. Court Rules*, *No.* 51,

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(*a*) See *ante*, *p.* 290. (*b*) See *ante*, *p.* 291. (*c*) See *ante*, *p.* 293.
(*d*) See the former practice, in such case, *ante*, *p.* 295, *note.*

supra. For form of notice of hearing, see *Appendix*, No. 192.

Proceedings if Party adopts the Return.] If the party to whom the writ of prohibition is directed shall, by an instrument in writing to be signed by him, and annexed to the return, adopt the same return, and rely upon the matters therein contained, as sufficient cause why such court should not be restrained as mentioned in the said writ, such party shall thenceforth be deemed the defendant in such matter; and the person prosecuting such writ may reply, take issue, or demur to the matters so relied upon by such defendant; and the like proceeding shall be had for the trial of issues of law or fact, joined between the parties, and for the rendering of judgment thereupon, as in personal actions. 2 *R. S.* 587, *sec.* 63. For form of writing, adopting return, see *Appendix*, No. 190.

If, in such case, judgment shall be rendered for the party prosecuting such writ, a prohibition absolute shall be issued; but if judgment be given against such party, a writ of consultation shall be awarded, authorizing the court and party to proceed in the suit or matter in question. *Ib. sec.* 65; 3 *Bl. Com.* 114. For form of writ of consultation, see *Appendix*, No. 195.

Proceedings if the Return is not Adopted.] If the party to whom the writ of prohibition is directed, shall not adopt such return as above provided, the party prosecuting such writ shall bring on the argument of such return, as upon rules to show cause; and he may, by his own affidavit, and other proofs, controvert the matters set forth in such return. And the court, after hearing the proofs and allegations of the parties, shall render judgment, either that a prohibition absolute, restraining the said court and party from proceeding in such suit or matter, do issue, or a writ of consultation, authorizing the court and party to proceed in the suit or matter in question. 2 *R. S.* 588, *sec.* 64; 3 *Bl. Com.* 114; *Bac.*

Abr., *Prohibition.* For form of prohibition absolute, see *Appendix*, No. 194.

Amendments.] Either party may apply to the court for leave to amend the writ of prohibition, pleadings, &c. 2 *R. S.* 425, *sec.* 10.

Costs.] Costs, in these proceedings, may be awarded or not, in the discretion of the court, *Laws of* 1854, *sec.* 3, *ante*, *p.* 16, *note; and see* 19 *Barb.* 658; and when awarded, are to be at the rate allowed for similar services in civil actions. *Id. ibid.*

Appeals.] From the decision of the court at the special term, an appeal lies to the general term, the same as in mandamus. And from the judgment of the general term, an appeal may be taken to the Court of Appeals. *Code of Pro.* § 11; *and see Laws of* 1854, *p.* 592, *ante*, *p.* 16, *note;* 19 *Barb.* 658.

CHAPTER IX.

PARTITION.

At the common law, although partition could be made in every case by the consent of all the owners, yet it could not be compelled by one co-tenant against the will of the others, or of any of them, except in the case of coparceners, until the statute of 31 *Henry* VIII. *ch.* 1; *and* 32 *Henry* VIII. *ch.* 32, extended the writ of partition to joint tenants and tenants in common. *Co. Litt.* 187; *Bac. Abr.*, *tit. Joint Tenant I. No.* 7; *Will. Eq. Jur.* 699.

The first act on the subject of partition in this State, was passed under the colonial government, on the 30th October, 1708; and other acts were subsequently passed from time to time, on the same subject. *See note in* 1 *R. L.* 507. At the close of the Revolution, on the 16th March, 1785, the first act was passed for the partition of lands, under the State government. *Ib.* The latter act, with the amendments and alterations subsequently made, was a substantial re-enactment of the English statutes above-mentioned. *Ib.; and see Will. Eq. Jur.* 699. (*a*)

The several statutory provisions on the subject were revised by the laws of 1813, 1 *R. L.* 507; and again in 1830, 2 *R. S.* 317; and the latter revision, with the amendments

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(*a*) See the history of the statutory law of this State on the subject of partition, in part reviewed, by Davis, J., 5 *Abb. Pr. R.* 92 *to* 106.

and alterations since made, constitute the present law of this State. (*a*)

When Partition will be Made.] The statute provides that where several persons shall hold and be in the possession of any lands, tenements, or hereditaments, as joint tenants, or as tenants in common, in which one or more of them shall have estates of inheritance, or for life or lives, or for years, any one or more of such persons, being of full age, may apply for a *division* and *partition* of such premises, according to the respective rights of the parties interested therein; and for a *sale* of such premises, if it shall appear that a partition thereof cannot be made without great prejudice to the owners. 2 *R. S.* 317, *sec.* 1.

The qualification that the persons applying for partition must be of full age, applies equally to all the plaintiffs; and, therefore, proceedings for the partition of lands cannot be maintained by an *infant*, either separately, or jointly, with adult co-tenants in common. 4 *Sand. Ch. R.* 508.

The statute, however, has provided, that whenever an infant shall be possessed of real estate, as tenant in common or joint tenant, the Supreme Court may authorize proceedings to be instituted on behalf of such infant for a division and partition of said real estate, and for a sale thereof, if it shall appear that such partition cannot be made without great prejudice to the owners. *Laws of* 1852, *p.* 411, *sec.* 1. (*b*) But such authority will not be given, nor will such partition or sale be directed by the court, unless it is made satisfactorily to appear that the interests of such infant require such partition or sale. *Ib. sec.* 2. And where the question was referred to a referee, and he reported "that in his opinion it

(*a*) For the amendments and alterations since the Revised Statutes, see *Laws of* 1830, *p.* 396; *Laws of* 1833, *p.* 311; *Laws of* 1840, *p.* 128; *Ib.* 321; *Laws of* 1846, *p.* 204; *Laws of* 1847, *p.* 556; *Ib.* 640; *Laws of* 1852, *p.* 411; *Laws of* 1857, *vol.* 2, *p.* 504; *Pub. Acts*, *p.* 184.

(*b*) The general guardian of the infant may also be authorized to agree to a division or sale of the infant's estate, on application to the Supreme Court. *See* 2 *R. S.* 331, *and post*, "Partition and Sale of Infants' Estates."

would be proper to allow the infant to prosecute an action for the partition or sale of the premises," but without setting forth the facts to warrant such a conclusion,—it was held not sufficient, and the application for leave to prosecute, was denied. See 15 *How. Pr. R.* 383.

By the statute, also, as we have seen, the party applying for partition, must be in the *possession* of the premises. 2 *R. S.* 317, *sec.* 1, *supra.* Under this provision it has been held that the party instituting the proceedings must have an estate entitling him to immediate possession. 19 *Wend.* 367. Again, that he must not only have a present estate in the premises, as a joint-tenant, or tenant in common, but that he must be in the actual or constructive posse-sion of his undivided share or interest. 2 *Barb. Ch. R.* 398; 5 *Denio*, 388. And that a party having a mere reversionary interest in the premises, which are in the possession of another having a life estate therein, cannot apply for a partition, not having any possession either actual or constructive. 11 *How. Pr. R.* 489. And again, that a mere reversioner cannot institute proceedings for partition without the concurrence of the owners of the present interest. 2 *Paige*, 387.

In conflict with the above cases, is the case of *Blakely* ag'st *Calder and others* (13 *How. Pr. R.* 476), where it is held that although the party applying for partition must be in the possession of the premises, yet it is not necessary that he should be the actual occupant, or should hold an immediate present interest; and, therefore, that an existing admitted life estate, although covering the whole premises, will not prevent the remainderman from being deemed "in possession," within the meaning of the statute. (*a*) This decision is in accordance with subsequent and other statutory provisions, which seem to contemplate not only a partition, but a sale of the premises, on the application of the remain-

(*a*) See this case in the Court of Appeals, where the decision of the Supreme Court was affirmed, though not on the ground stated in the court below. 15 *New York R.* 617. But see to the same effect as stated above, the opinion of Denio, C. J. *Ib.* 623.

derman or reversioner, in cases where there is a life estate in the whole or any part of the premises in question. See 2 *R. S.* 325, *secs.* 50, 51, *and Laws of* 1847, *p.* 557, *sec.* 5.

As a general rule, proceedings for partition may be instituted by one tenant in common out of possession against another who is in possession; for the possession of one is the possession of both. 1 *Hoff. R.* 21. And so, where an intestate was seized and possessed of lands which descend to tenants in common, one of them though not in possession, may apply for partition, the lands being unoccupied. 4 *Kern.* 235.

Where the party instituting the proceeding is not in the possession of the premises, and there are infant defendants, the court is bound to notice the objection, whether it is taken or not, 11 *How Pr. R.* 489; though such disability, ought regularly to be pleaded, 19 *Wend.* 367; 3 *Paige*, 245; unless it distinctly appears by the petition itself. 2 *Barb. Ch. R.* 398. If, however, there has been an omission to plead it, it may be taken advantage of at the trial under the plea of non tenent insimul. 19 *Wend.* 367.

Nor will proceedings for partition be authorized, where the defendant is in possession claiming adversely to the plaintiff. *Harp. Eq. R.* 106; 2 *Barb. Ch. R.* 398; 11 *L. O.* 116. Nor in favor of a party who has merely a future contingent interest in an undivided share of the premises. 2 *Paige*, 387. Nor in favor of a widow having only a right of dower in the premises, 1 *Sand. Ch. R.* 199; *and see* 15 *Johns. R.* 319; nor against her where she is the sole defendant in the proceedings. *Id. ibid.* Nor will the proceeding for partition be authorized where the title is denied, or is not clearly established, or depends on doubtful facts or questions of law. 1 *Johns. Ch. R.* 111; 1 *Ed. Ch. R.* 266; 5 *Barb.* 52; 4 *Rand.* 493. But where the title is not in dispute, partition is matter of right. 4 *Barb.* 229; 10 *Paige*, 470.

And so, where lands are devised subject to the performance of a condition subsequent, and the devisee enters, and suffers a breach of the condition, the party entitled to an undivided part of the premises in consequence of the breach of the condition, as tenant in common with the devisee, cannot

apply for partition against the devisee. 5 *Denio*, 385. In such case he must first establish his title by action. *Ib.; and see* 4 *Paige*, 639. And so, if there has been an actual ouster of the plaintiff by his co-tenant, or if the land is held adversely, the party must regain the actual seizin by action before proceedings for partition can be sustained.(*a*) 3 *Paige*, 245; 9 *Cowen*, 530; 11 *L. O.* 116.

Where lands leased for a term of years, are owned by several persons as tenants in common both of the rents and the reversion, proceedings for partition may be sustained; and if a sale of the premises is ordered, it must be made subject to the right of the lessees, who, by the sale, will become the tenants to the purchaser of the rents and reversion. 5 *Paige*, 518. But where a lessee of land becomes a purchaser of an undivided moiety of the rent and reversion, the lease and rent thereby become merged and extinguished as to that portion of the premises; and the lessee is not such a tenant of the rent and reversion with the owner of the other half thereof, as to entitle the latter to a partition of the land during the continuance of the lease. 4 *Id.* 639.

Proceedings for partition may also be instituted by parties who are seized of a life estate, in real estate, by virtue of an assignment to them, by one of the tenants in common in trust for the benefit of his creditors. 2 *Barb. S. C. R.* 599.

But partition will not be granted amongst heirs at law, if the personal property of their ancestor appears to be insufficient for the payment of his debts, 1 *Ed. Ch. R.* 565; at any rate, it seems, not before the expiration of three years from the granting of letters testamentary or of administration upon his estate. *Ib.* 568, 570; 10 *How. Pr. R.* 189; but see 7 *Id.* 307; 7 *Paige*, 550; 5 *Abb. Pr. R.* 53.

(*a*) A party, however, may go into a court of equity upon an equitable title. And although the fact that the defendant is in possession of premises, claiming to hold them adversely, is in general a sufficient ground for denying a partition, yet where the question arises upon an equitable title set up by either of the parties, the court will not suspend the proceedings without doing complete justice between the parties. See 5 *Barb.* 52; 4 *Johns. Ch. R.* 271; 1 *Hoff. R.* 21.

Where several tracts or parcels of land lying within this State are owned by the same persons in common, no separate proceedings for a partition of a part thereof only, can be brought without the consent of all the parties interested therein; and if brought without such consent the share of the plaintiff may be charged with the whole costs of the proceedings. *Sup. Court Rules*, 1848, *No.* 77; *Eq. Rules*, 1847, *No.* 122.

How Commenced.] The proceeding for the partition of real estate may be instituted by petition (*a*) under the Revised

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(*a*) It is declared by Mr. Justice Pratt, in *Croghan* v. *Livingston*, in the Court of Appeals (6 *Abb. Pr. R.* 350, 355), reported since this chapter was prepared, that the provisions of the Revised Statutes in relation to the partition of real estate, by petition, are abolished. What is there stated, however, upon that subject, was not necessary to the decision of the case; nor, as I am informed, was the question passed upon by the court, or discussed by the counsel who argued it. The learned justice bases his conclusions principally upon the changes made in the Code of Procedure, by the amendments of 1849. By § 390 of the Code of 1848, the Code was not to affect the proceedings provided for by Titles 2, 3, 4, 5, 6, and 8, of chap. 5, part 3, of the Revised Statutes. Title 3, alluded to, relates to proceedings in partition. In the Code of 1849 that title was omitted; also Titles 2, 4, and 5. By the Code of 1849, also, the provisions of the Revised Statutes, relating to the partition of lands, &c., were made to apply to actions for partition brought under the Code of Procedure, so far as the same could be so applied to the substance and subject-matter of the action, without regard to its form. *Code*, § 448. And though the Code of 1848, also clearly authorized proceedings by action for partition (§§ 103, 388, 390), yet the question whether it did in fact authorize such proceedings seemed to be left in doubt by the case of *Traver* v. *Traver* (3 *How. Pr. R.* 351, 354; and see *Id.* 290, per Hand, J.; *Id.* 318; 4 *Id.* 83, 84; *Id.* 133). Besides, while it was proper that the provisions of the Revised Statutes, relating to proceedings in partition, should be applied to an action for partition brought under the Code, yet the Code of 1848 contained no section in terms making those provisions applicable to such action. Hence the amendments to the Code of 1849; which were no doubt thought necessary by the legislature with a view of putting at rest the question whether an action for partition was proper under the Code; and for the purpose, also, of making the provisions of the Revised Statutes applicable to such action.

By the amendments of 1849, also, as we have seen, Titles 2, 4, and 5, above mentioned, were also omitted from the Code. Title 2 provides for the determination of claims to real estate; Title 4 relates to the writ of nuisance, and Title 5 to the action of waste. And the amendments of 1849, in respect to those

Statutes, 2 *R. S.* 318, *secs.* 5, 10; or by summons, or summons and complaint under the Code of Procedure. *Code*, §§ 127 *to* 139, 448; *and see post*, "Petition."

If the proceeding is commenced by petition, a copy of such petition, with a notice that the same will be presented to the court on some certain day in term, must be served upon

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titles, authorized an action for the proceedings under the Revised Statutes, and in express terms abolished the action of waste and the writ of nuisance. *Code*, §§ 450, 451, 453, 454. But in respect to proceedings for partition, although it authorized an action to be prosecuted for the partition of real estate, and made the provisions of the Revised Statutes applicable to such action, yet it nowhere in terms abolished the proceeding by petition. And as the two proceedings are not inconsistent with each other, the inference is, that the remedy may be taken by action under the Code, or by petition under the Revised Statutes, in like manner as it could formerly be done by bill or petition in the Court of Chancery. See 2 *R. S.* 329, *sec.* 79; 3 *How. Pr. R.* 351; 4 *Id.* 83; *Id.* 133, per Barculo, J.; *Id.* 125.

But it is said that Title 3, above mentioned, was not "reserved" by § 471 of the Code of 1849; and, therefore, that it is abolished, unless expressly saved by other provisions of the Code. It is submitted, however, that no such construction can be given to that section. That section, except in respect to statutory provisions inconsistent with the Code, and therefore repealed by § 468, had no effect, either to reserve or to abolish the several proceedings mentioned in it. But its sole object had reference to the application of the Code to them, and to prevent such application except as therein mentioned; and though it recognized the existence of those proceedings, it did so for that purpose alone. And as the proceeding for the partition of real estate by petition, is a special statutory remedy, not inconsistent with the Code, the omission to include the title relating to that proceeding among the titles enumerated in § 471, can have no effect upon the question whether that remedy is abolished or not.

But, that Title 3 is nevertheless excepted by that section from the operation of the second part of the Code, is evident from the exception of special statutory remedies not theretofore obtainable by action; language sufficiently general to include the statutory remedy by petition. *See* 2 *Whit. Pr.* 332; 16 *New York R.* 82, 83, per Denio, Ch. J.

It is believed, for the reasons above stated, that Title 3 remains unrepealed; and that proceedings for partition may be taken by petition under its provisions, as well as by action under the Code of Procedure. And that such has been the understanding of the profession, will be seen by reference to the following authorities: 3 *How. Pr. R.* 351, 354; 4 *Id.* 83; *Id.* 133; *Id.* 125; 25 *Barb.* 336; 16 *New York R.* 82, 83; 2 *Whit. Pr.* 330 to 333; 2 *Mon. Pr.* 254. And see, as evidence of the intention of the legislature to retain the proceeding by petition, *Laws of* 1852, *p.* 411; *Laws of* 1857, *vol.* 2, *p.* 504; *Pub. Acts*, 184.

the defendants. (*a*) 2 *R. S.* 318, *secs.* 10, 11. *Laws of* 1847, *p.* 640, *sec.* 14.

Parties.] The party applying for the partition, as we

(*a*) The more usual course, however, has been, to institute the proceedings by *action*, under the Code of Procedure.

The action is commenced by service of the summons, or summons and complaint, as in ordinary cases. *Code of Pro.* §§ 127 to 139. For forms, see note to *Appendix*, No. 202; and for other forms in proceedings by action, see *Appendix*, Nos. 209, 245, *notes*. In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the premises of which partition is sought, and that no personal claim is made against the defendant; in which case no copy of the complaint need be served on the defendant, unless within the time for answering he shall, in writing, demand the same. For form of notice, see *Appendix*, No. 202, *note*. If the defendant on whom the notice is served, unreasonably defend the action, he will be liable to pay costs to the plaintiff. *Ib.* § 131; and see 9 *Paige*, 230.

The provisions of the Revised Statutes relating to the partition of lands, and herein considered, are to apply to an action for partition, under the Code of Procedure, so far as the same can be applied to the substance and subject-matter of the action, without regard to its form. *Code of Pro.* § 448.

The proper construction applicable to the above section (§ 448), is stated by Hoffman, J., substantially thus: The Code is to regulate the course of proceedings in the action for partition generally, as well as in any other. But those provisions of the statute which are peculiar to the action of partition, and as to which there is no corresponding provision in the Code, must prevail. And again, provisions of the statute which are in addition to, and consistent with, any provision of the Code upon a particular subject-matter, are likewise to govern. 2 *Abb. Pr. R.* 13.

Accordingly, the provisions of the Revised Statutes (*secs.* 2, 3, and 4, *post*) with respect to the appointment of the guardian, ad litem, of infants, and the security to be given, apply to actions for partition, brought under the Code of Procedure, *Ib.* 6, 11; 2 *Duer*, 635; though they are inapplicable so far as they relate to the parties to apply for a guardian, and the time and mode of applying. 2 *Abb. Pr. R.* 15, per Hoffman, J. The Code (§ 116) will regulate the form of applying, and the parties to apply. *Ib.*

And so, the service of the summons in an action for partition, is made the same as in other actions, *Ib.*; and if the plaintiff is obliged to make "unknown owners," defendants, he is entitled to proceed against them by publication of the summons under § 135 of the Code. 11 *How. Pr. R.* 277.

And so, in actions for partition, the system of pleading prescribed by the Code is to be observed; though with respect to the complaint, it should no

have seen, must have an estate in the premises as a joint tenant or a tenant in common, and must be in the possession of his undivided share or interest. *See supra.* The party must also be of full age; though on application to the Supreme Court, and showing sufficient reasons therefor, authority will be given to commence the proceedings in behalf of an infant; in which case the proceedings must be conducted in the name of such infant by a competent next friend, to be appointed by the court for that purpose. *Laws of* 1852, *p.* 411, *post; and see* 13 *How. Pr. R.* 105.

If the proceedings are commenced by a wife for the partition of premises owned by her, separately from her husband, it would be improper to join the husband as a party plaintiff. 8 *How. Pr. R.* 389; though in such case, it seems, it would be proper to make him a defendant in the proceedings. *See Ib.* 393, *and cases there cited.*

Where, however, the suit is instituted by a party whose wife has an inchoate right of dower in the premises sought to be partitioned, the wife in such case, whether an infant or an adult, is a proper and necessary party; and should be joined with her husband as plaintiff in the proceedings. *Ib.* 456; *and see* 7 *Paige*, 387.

And so, in proceedings for the partition of the real estate of a lunatic, or of an habitual drunkard, it would be irregular for the committee of such person to institute the proceedings in their name, alone; but such lunatic, or habitual drunkard, is a necessary party to the proceedings, and should be joined with the committee, as plaintiff therein. 3 *Barb. Ch. R.* 25.

Where the proceedings for partition are commenced by the assignees of a tenant for life, who had assigned the

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doubt contain the same matters required by the statute, to be stated in the petition. These are in addition to, or in compliance with, the requisitions of § 142 of the Code. 8 *How. Pr. R.* 458; 2 *Abb. Pr. R.* 14, 15.

And so, where the defendants in an action for partition omit to answer the complaint, the plaintiff must exhibit proof of his title, &c., on a reference for that purpose, the same as where the proceedings are commenced by petition under the revised statutes. 8 *How. Pr. R.* 456; 6 *Id.* 491; 2 *Whit. Pr.* 43, 59; 2 *Abb. Pr. R.* 15, *supra.*

premises for the benefit of his creditors, the legal estate is in the assignees, and the creditors are not necessary parties to the proceedings. 2 *Barb. S. C. R.* 599; *and see* 8 *Paige*, 513. But where an undivided portion of the premises has been conveyed to trustees, upon a trust not authorized by law, the cestui que trust is a necessary party to the proceedings, to make the judgment binding upon his interest in the premises. *Ib.*

With respect to parties defendants, it may be stated, generally, that all persons should be made parties to the proceedings who have any interest whatever in the premises of which partition is sought, or any part thereof.

The statute provides, that every person interested in the premises, whether in possession or otherwise, including those having an interest therein as tenant for years, for life, by the curtesy, or in dower, and the persons entitled to the reversion, remainder, or inheritance after the termination of any particular estate therein, and every person who, by any contingency contained in any devise, grant, or otherwise, may be or become entitled to any beneficial interest in the premises, and every person entitled to dower in the premises if the same has not been admeasured, may be made parties to the proceedings. 2 *R. S.* 318, *sec.* 6; *Ib. sec.* 5, *sub.* 2; 2 *Paige*, 387; 1 *Barb. S. C. R.* 500; 7 *Id.* 221.

The provision authorizing a person entitled to dower in the premises if the same has not been admeasured, to be made a party to the proceedings, was inserted in the statute to reach the case of a doweress who was entitled to an estate as tenant in dower in the whole premises; the Supreme Court having decided (15 *Johns. R.* 319), that the statute of 1813 did not reach the party entitled to dower whose husband was not a tenant in common of an undivided share of the estate. *Rev. Notes*, 3 *R. S.* 3*d ed.* 711; 7 *Paige*, 410.

And it was held in the case of *Tanner* against *Niles* (1 *Barb. S. C. R.* 560, 564; and see to the same effect, *Ib.* 500), that where the dower interest is in an undivided share of the lands to be divided, the person having such interest, is a proper party to the proceedings; but that it was not neces-

sary, though generally advisable, to make the persons parties who are entitled to dower which has not been admeasured, and which extends to the whole of the premises of which partition is sought; and that the statute does not, in any case, contemplate an admeasurement of a dower interest in the proceedings for the partition of the premises. But since the decision of that case an act has been passed which seems to contemplate an admeasurement of the widow's dower in the premises of which partition is sought, whether the dower extends to the whole or to only a part of the premises in question. *See Laws of* 1847, *p.* 557, *sec.* 5, *post.* In view of that act, therefore, and the other statutory provisions on the subject (2 *R. S.* 318, *secs.* 5, 6; *Ib.* 322, *sec.* 35; *Ib.* 325, *secs.* 50, 51), it would undoubtedly be the proper course, in all cases, to make the persons entitled to dower in the premises, parties to the proceedings, whether the dower extends to the whole of the premises, or only to an undivided portion thereof; and whether the same has been admeasured or not.

The effect of not making all the persons interested parties to the proceedings, would be to prevent the plaintiff, at the hearing, from obtaining judgment of partition. 2 *Barb. Ch. R.* 398. But where all the parties are adults, and have been personally served with process, the court will not examine the proceedings to ascertain whether all the proper parties are before the court, 8 *Paige*, 513; though it would be otherwise if the persons are proceeded against as absentees, or as unknown owners of undivided portions of the premises, or where the rights of infants are concerned. If the parties are adults, and the other necessary parties are not brought in, the defendants who have been served with process should appear, and make the objection. *Ib.*

If any person interested in the premises, or having any claim by which he may become interested at any future time, has not been made a party to the proceedings, he may, notwithstanding, be admitted to appear and answer as a defendant, on application to the court, or to a judge thereof in vacation, upon his petition accompanied by an affidavit of his interest. 2 *R. S*, 319, *sec.* 15.

And the court will also allow an amendment of the pleadings or proceedings, so as to make defendant thereto, any person who shall have appeared, in the course of the proceedings, to be interested in the premises, by any will, deed, or grant from any person who is a defendant in such partition, and who might originally have been made defendant, if his interest had then existed or been known. But no person can be so made defendant without forty days' notice of the motion to that effect being personally served on him, or published three months, as in the case of an original application. *Ib.* 320, *sec.* 20; *and see ante, pp.* 320, 322, *notes.*

With respect to *creditors* having a lien upon the premises, or any part thereof, by judgment, decree, mortgage or otherwise, it is not necessary in the first instance to make them parties to the proceedings. 2 *R. S.* 318, *sec.* 8, as altered by amendatory act of 1830, chap. 320, sec. 40. But the plaintiff may, at his election, make every creditor a party to the proceedings who has a *specific* lien upon the undivided interest or estate of any of the parties, by mortgage, devise, or otherwise. *Id. ibid. sec.* 41. And this is the course usually adopted in practice, as it saves the necessity of amending the petition in case the premises are to be sold. 2 *R. S.* 324, *sec.* 42; 2 *Barb. Ch. Pr.* 288. And not only are the creditors having specific liens upon the premises, or on any undivided share thereof, usually made parties if a sale is to be made, but those, also, having general liens by judgment or otherwise. *See* 7 *How. Pr. R.* 307.

Notice of Lis Pendens.] The party instituting the proceedings, on filing the petition, should file with the clerk of each county in which the property is situated, a notice of the pendency of the proceedings, containing the general object thereof, the names of the parties, and the description of the property in that county affected thereby. *Eq. Rules*, 1847, No. 121; and see *Code of Pro.* § 132. For form, see *Appendix*, No. 201.

From the time of filing the notice only, will the pendency

of the proceedings be constructive notice to subsequent purchasers or incumbrances. *Id. ibid.* (*a*)

Guardian ad litem for Infants.] If the proceedings are instituted on behalf of infants under the authority of the Supreme Court, a competent next friend or guardian must be appointed by the court to conduct the proceedings; which next friend or guardian is appointed upon the like application, and in the like manner, and must give the same security, and will possess the same powers, as guardians appointed for infant defendants on the application of a party instituting proceedings against them. *Laws of* 1852, *p.* 411; and see 6 *Abb. Pr. R.* 350, per Pratt, J.

The appointment must be made by the Supreme Court. *Id. ibid.* Where it was made by a county judge, the proceedings were declared void, and were set aside on motion. 13 *How. Pr. R.* 105.

With respect to infant defendants, it is provided by the Revised Statutes that whenever it shall be represented to the *court*, (*b*) by any party intending to make application for the partition of premises, that there are minors who should be parties to the proceedings, and it is satisfactorily proved to the court that at least ten days' notice has been served on such minors as reside within this State, or upon their general guardians, of an intention to apply to such court for the order herein mentioned, such court shall thereupon appoint a suitable and disinterested person to be the guardian for one or more of such minors, whether such minors shall reside in

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(*a*) And every person whose conveyance or incumbrance is subsequently executed or subsequently recorded, will be deemed a subsequent purchaser or incumbrancer, and will be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action. *Code of Pro.* § 132, *as amended by Laws of* 1858, *chap.* 306.

(*b*) In the first judicial district, however, in *actions* for partition, under the Code of Procedure, the application may be made to a judge at chambers. The order appointing the guardian, in such case, operates as an order of the *court*. 5 *Abb. Pr. R.* 53. *But see Code of Pro.* § 448; 2 *Duer*, 635; 2 *Abb. Pr. R.* 6, 13, 15, *ante*, *p.* 322, *note.*

or out of this State, for the special purpose of taking charge of the interests of such minors in relation to such proceedings. 2 *R. S.* 317, *sec.* 2; 2 *Duer*, 635; *and see ante*, *p.* 322, *note.* For forms, see *Appendix*, Nos. 196, 198, 199.

Every guardian so appointed, shall, before entering upon the execution of his duties, execute a bond, in such penalty, and with such surety, as the court shall direct, to the people of this State, conditioned for the faithful discharge of the trust committed to such guardian, and to render a just and true account of his guardianship, in all courts and places when thereunto required (*a*) and before any rule to plead, or any other subsequent rule or order shall be made, the court shall be satisfied that such bond has been executed and filed in the office of the clerk. 2 *R. S.* 317, *sec.* 4; and see *ante*, *p.* 322, *note.*

The bond must be signed by the guardian himself; and if executed by sureties in his behalf, in which he does not join, it is not a compliance with the statute. 2 *Abb. Pr. R.* 6. For form, see *Appendix*, No. 200.

Whenever it shall appear that in any action, suit, or proceeding for the partition of lands, heretofore instituted, or hereafter to be instituted in any court authorized to decree

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(*a*) When, however, any of the joint tenants or tenants in common who are defendants, are minors, for whom no suitable or disinterested person shall voluntarily signify his consent in writing to be appointed guardian, and offer to give the security required by the statute, it is the duty of the court on the petition of the party instituting the proceedings, to appoint the clerk of the court the guardian for such minors for the purposes of the partition, and to dispense with the security required by the statute. *Laws of* 1833, *p.* 311. But a copy of the petition, with a notice in writing specifying the time and place when and where the same will be presented, must be served at least ten days before the presentation thereof, upon the general guardian of such minors, in case there be such guardian, or upon the minor if there be none; proof of which service must be duly made to the court. *Id.*

The court may also appoint the clerk guardian ad litem of an infant defendant who is an absentee, without security, and without any notice of the application, to the infant, except the general notice by advertisement for the absentee to appear and answer. 7 *Paige*, 596. But no other person can be appointed guardian in such case without giving security. *Ib.*

partition or sale thereof, any such guardian has entered upon the execution of his duties, and rules or orders have been made without the filing of the bond above required, or that such bond cannot be found on file, such court, or any judge thereof, may, on application of any party to the suit or proceeding at any time before judgment or decree, in all cases, or after judgment or decree in cases of actual partition, authorize and direct the filing of a bond by such guardian and the penalty and surety thereof to be filed as of the same date with the order appointing the guardian; which bond, when so filed, and all proceedings in the suit subsequent to the date of the order appointing the guardian, shall have the like force and effect in every respect as if such bond had been directed by the court and duly executed and filed by the guardian at the date of his appointment. *Laws of* 1852, *p.* 411, *sec.* 3; 6 *Abb. Pr. R.* 350.

In an action for partition where the guardian, at the time of his appointment, omitted to file the bond as required by the statute; but after judgment and sale, an order was made giving him leave to file a bond *nunc pro tunc*, which was done,—it was held proper, and that it was a mere irregularity of which the court on application would allow an amendment. 25 *Barb.* 336, *aff. in C. of A.*, 6 *Abb. Pr. R.* 350; *but see* 2 *Id.* 6.

The guardians thus appointed, who give the bond required by the statute, will represent their respective minors in the proceedings; and their acts in relation thereto will be binding on such minors, and be as valid as if done by such minors after having arrived at full age. 2 *R. S.* 317, *sec.* 3.

Petition.] The petition is the foundation of the proceeding, and answers to the complaint in an action. (*a*) 2 *R. S.* 319, *sec.* 15; 21 *Barb.* 9.

It is necessary, by the statute, that the petition should contain the following matters:

(*a*) *See ante, pp.* 320, 322, *notes.*

1. It must particularly describe the premises sought to be divided or sold;

2. It must set forth the rights and titles of all persons interested therein, so far as the same are known to the petitioner, including the interest of any tenant for years, for life, by the curtesy, or in dower, and the persons entitled to the reversion, remainder, or inheritance after the termination of any particular estate therein, and every person who, by any contingency contained in any devise, grant, or otherwise, may be or become entitled to any beneficial interest in the premises; and,

3. It must be verified by affidavit. 2 *R. S.* 318, *sec.* 5; (*a*) 6 *Paige*, 492. For form of petition, see *Appendix*, No. 202; and for form of complaint in an action for partition, see *Appendix*, No. 202, *note.*

When infants are interested in the premises, the petition must also state whether or not the parties own any other lands in common. *Sup. Court Rules*, 1858, *No.* 77; *Equity Rules*, 1847, *No.* 122.

And where any one or more of the parties to the proceedings, or the share or quantity of interest of such parties, is unknown to the petitioners, or is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder, so that such parties cannot be named, the same shall be set forth in the petition. 2 *R. S.* 318, *sec.* 7.

Where the plaintiff shall make creditors having specific liens upon the undivided interests or estates of any of the parties, by mortgage, devise, or otherwise, parties to the proceedings, the petition must set forth the nature of every such lien or incumbrance. 2 *R. S.* 318, *as amended*, *act of* 1830, *ch.* 320, *sec.* 41.

(*a*) In *actions* for partition, the system of pleading prescribed by the Code is to be observed; though, in respect to the complaint, it should, no doubt, contain the same matters required by the statute to be stated in the petition. These are in addition to, or in compliance with, the requisitions of § 142, of the Code. 8 *How. Pr. R.* 458; 2 *Abb. Pr. R.* 14, 15.

If the petition alleges that the parties are seized in common, it is not necessary also to allege that the plaintiff is in possession of the premises, as that fact will be presumed from the former allegation. See 3 *Paige*, 242.

Notice.] Notice of the application must be prepared, stating that the petition will be presented to the court on some certain day in term; and must be directed to all the parties who are known and whose interests are known, and to those who are known but whose interests are uncertain, contingent, or unknown, by name; and generally to all others unknown, having or claiming any interest in the premises. 2 *R. S.* 318, 319, *secs.* 10, 11. For form of notice, see *Appendix*, No. 203.

Service of Petition and Notice.] A copy of the petition, with the notice above described, must be served forty days previous to the term, at which the application is to be made, on all the parties interested in the premises sought to be partitioned, who shall not have joined in the petition, and on the guardians of such as are minors, who shall have been appointed in the manner authorized by the statute. 2 *R. S.* 318, *sec.* 10.

If any of the parties interested in the premises, are unknown, or if either of the known parties, whether minors or of full age, reside out of this State, or cannot be found therein, and such facts be made to appear to the court by affidavit, the petition and notice may be served on such unknown or absent party by publishing the same, for three months previous to the presentation of the petition, once in each week successively, in the State paper, and in a newspaper printed in the county where the premises are situated, if there be any, and if there be none, then in a newspaper printed in the city of New York, which shall be equivalent to a personal service on such known or unknown parties. Or, instead thereof, with respect to any known absent party, such petition and notice may be served personally, out of this State,

forty days previous to its presentation, without publishing the same. (*a*) *Ib.* 319, *sec.* 12.

Application.] The application must be made to the court in which the proceedings are commenced; and should be founded upon the petition and notice, with proof of the due service of the same upon the parties interested; and if the same have been served by publication, by proof of such publication, and of the facts justifying the mode of publication. 2 *R. S.* 319, *sec.* 13.

Where there are infant parties, the application must also be accompanied by the certificate of the clerk, or other proof, showing that the bond required to be given by the guardian ad litem, has been duly executed, and filed in the office of the clerk of the court. 2 *R. S.* 317, *sec.* 4.

To what Court.] The application for partition may be made to the Supreme Court, or to the county court of the county, or the mayor's court of the city, where the premises are situated, 2 *R. S.* 317, *sec.* 1; *Code of Pro.* § 30, *sub.* 4; or to the Superior Court of the city of Buffalo, when the premises are situated within that city, *Laws of* 1854, *p.* 224; *Laws of* 1857, *vol.* 1, *p.* 752; or, in the city and county of New York, to the Court of Common Pleas of that city, when the premises are situated within the limits thereof. (*b*) *Laws of* 1854, *p.* 464, *sec.* 6.

(*a*) Where, however, the proceeding for partition is by *action*, and the plaintiff is obliged to make "unknown owners" defendants, he is entitled to proceed against them by publication, under § 135 of the Code of Procedure, 11 *How. Pr. R.* 277; and generally, in such case, the service of the summons is made the same as in ordinary cases. 2 *Abb. Pr. R.* 15; 2 *Duer*, 635; and see *ante*, p. 322, note.

(*b*) In addition to the courts here named, in *actions* for the partition of real estate, the Superior Court of the city of New York, the City Court of Brooklyn, and the recorders' courts of cities, have also jurisdiction in partition cases, when the premises are situated within those cities respectively. *Code of Pro.* §§ 33, 123; *Laws of* 1849, *p.* 170; 16 *New York R.* 80. And they have such jurisdiction without reference to the residence of the parties. 2 *Duer*, 635; and see 13 *How. Pr. R.* 254.

The application for leave to institute proceedings on behalf of infants, can be made only to the Supreme Court. *Laws of* 1852, *p.* 411. Whether the proceedings for the partition in such case, must also be brought in that court, is not clear by the statute; though the safer course undoubtedly would be to institute the proceedings in that court in all cases where there are infant plaintiffs. *Ib.; and see* 2 *Abb. Pr. R.* 14; 13 *How. Pr. R.* 106, 107.

Rule to Appear and to Answer, &c.] If the petition and notice are in the proper form, and the affidavit of the service of the same, &c., is satisfactory, the court will make an order requiring the parties interested in the premises, and who did not join in the petition, whether known or unknown, and whether the share or interest is known or unknown, or whether they are, or may become, entitled to any beneficial interest in the premises in reversion, remainder, or by any executory devise, contingency, or otherwise, to *appear* and show title to the proportions which they may claim of the premises set forth in the petition, and to *answer* the petition within the usual time allowed for pleading by the practice of the court. 2 *R. S.* 319, *sec.* 13. For form of order, see *Appendix*, No. 208.

Notice of the rule or order of the court should be given to the parties interested; and unless otherwise specially directed, it may be served by affixing the same in the office of the clerk of the court, which is made equivalent to personal service on the party to be affected by it. *Ib.* 14. And all other notices in any of the subsequent proceedings, may be served in like manner, and with the like effect, unless otherwise specially directed. *Ib.*

Proceedings in Case of Default, &c.] If the defendants or any of them, neglect or omit to plead to the petition within the time limited by the order of the court, their default may be entered as in ordinary actions. And if the default of any of the defendants, whether known or unknown, shall have been entered, the court will require the plaintiff to exhibit

proof of his title, and an abstract of the conveyances by which the same is held. (*a*) For form of order for judgment on default, see *Appendix*, No. 209. Such proof may be taken in open court, or by a reference for that purpose, to the clerk or other suitable person. 2 *R. S.* 321, *sec.* 22; *Laws of* 1847, *p.* 344, *sec.* 77. For form of order of reference, see *Appendix*, No. 215.

It is also substantially provided by Rule 78 of the Supreme Court, that where the rights and interests of the several parties, as stated in the petition, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a special term for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held. *Sup. Court Rules*, 1858, *No.* 78; *and see Eq. Rules of* 1847, *No.* 124; *and post*, "Proceedings for a Sale by a Referee." For forms, see *Appendix*, Nos. 239, 240.

Before reporting upon the title, and the rights and interests of the parties, the referee should require the plaintiff to produce the abstracts of his title, as a tenant in common in the premises, and to trace it back to the common source of title of the several tenants in common; and in his report, the referee should, as far as practicable, give an abstract of the conveyances of the several undivided shares or interests of the parties in the premises from the time they were united in one common source. See 7 *Paige*, 39.

The proof exhibited to the referee must be such, as, in an action of ejectment, would establish a *prima facie* right in

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(*a*) The rule is the same in *actions* for partition, where the plaintiff, in case the defendants omit to answer the complaint, must exhibit proof of his title, &c., on a reference for that purpose, the same as in proceedings under the Revised Statutes. 8 *How. Pr. R.* 456; 6 *Id.* 491; 2 *Whit. Pr.* 43, 59; 2 *Abb. Pr. R.* 15.

the plaintiff to recover the premises claimed by him. 3 *Wend.* 436; and see 2 *Paige*, 27.

The referee's report, together with the proofs taken, and the abstract of title furnished by the plaintiff, must be submitted to the court, 3 *Wend. supra;* and filed with the clerk. 2 *R. S.* 321, *secs.* 22, 23.

Who may Defend.] Any person having any interest in the premises, or having any claim by which he may become interested at any future time, in reversion, remainder, or by any executory devise, contingency, or otherwise, and whether such interest be present and vested, or contingent, and whether such parties or their interest be known or unknown, may, within the time prescribed in such rule, or within such further time as the court may allow for the purpose, appear and answer to the said petition as to a declaration. 2 *R. S.* 319, *sec.* 15.

And if such person be not named as a party in the petition he may be admitted to appear and answer the same, as a defendant, by the court, or by any judge thereof in vacation, upon his petition accompanied by an affidavit of his interest. *Ibid.*

Pleadings and Issue.] Any party appearing, may plead either separately or jointly, with one or more of his co-defendants, that the plaintiffs, or any of them, at the time of presenting the petition, were not in possession of the premises in question, or any part thereof; or that the defendants, or any of them, did not hold the premises together with the plaintiffs, at the time of the commencement of the proceedings, as alleged in the petition; and under the last mentioned plea, the defendant pleading it may give notice of any special matter to sustain such plea, and may give evidence thereof on the trial, as if the same had been pleaded. 2 *R. S.* 320, *sec.* 16; 15 *Wend.* 340; 19 *Id.* 367.

And the defendant is not confined in his plea to the two defences authorized to be pleaded by the above section; but he may allege anything that will abate the proceeding, or bar

the plaintiff's right to a judgment; and to the same extent as in personal actions. 4 *How. Pr. R.* 125; *s. c.* 2 *Code R.* 69; *and see ante p.* 322 *note.*

Where the party instituting the proceeding is not in possession of the premises, the disability should regularly be pleaded by the defendant, 19 *Wend.* 367; 3 *Paige*, 242; unless it distinctly appears by the petition itself. 2 *Barb. Ch. R.* 398. But if there has been an omission to plead it, it may be taken advantage of at the trial under the plea of non tenent insimul. 19 *Wend.* 367, *supra.*

And other and further pleadings may also be had between the parties respectively, according to the practice of the court, as in personal actions, until an issue or issues in law, or in fact, be joined between the parties, or some of them. 2 *R. S.* 320, *sec.* 17.

And whenever the joint tenancy, or tenancy in common, of any defendant shall be denied by a co-defendant, and it shall become necessary to determine the same, in order to effect a complete and final partition, so far as the rights of the parties are concerned, the court may direct an issue to be formed on the record, and may direct the jury to inquire into, try and determine, as well the tenancy of the defendant so denied, as the other issues joined on such pleadings. *Ib. sec.* 18.

Trial, and Proceedings thereon.] All the issues so joined shall be tried, and the like proceedings for the trial thereof shall be had, and bills of exceptions may be taken and demurrers to evidence filed, and the court may set aside verdicts and grant new trials therein, as in personal actions (*a*). *Ib. sec.* 19.

And either before or after the trial of any such issue, the court may permit the petition and all subsequent proceedings

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(*a*) The *place* of trial, also, as in *actions* for partition (*Code of Pro.* § 123), is in the county where the premises, or some part thereof, are situated. *Laws of* 1847, *p.* 332, *sec.* 45.

to be amended, so as to represent truly the rights claimed by any party. *Ib.*

Verdict.] On the plea of non tenent insimul, the plaintiff is entitled to a verdict if the parties held the premises together undivided, or as tenants in common, although their interests may be different from what they are described in the petition. 15 *Wend.* 340. And if the interests are incorrectly described, the court may amend the record and give judgment according to the rights of the parties. *Ib.; and infra.*

Amendments.] The court may allow any amendment of the pleadings or proceedings, so as to make defendant thereto, any person who shall have appeared, in the course of the proceedings, to be interested in the premises, by any will, deed, or grant from any person who is a defendant in such partition, and who might originally have been made defendant, if his interest had then existed, or been known. 2 *R. S.* 320, *sec.* 20.

But no person shall be so made defendant without forty days' notice of the motion to that effect being personally served on him, or published three months, as in the case of an original application. *Ib.*

After any such amendment, any party whose rights are affected thereby, and who has not had an opportunity to sustain his claim, shall be entitled to have an issue made up and tried, to determine such right; and the court may, after an amendment in any other case, where it may be deemed proper, order a trial to be had. *Ib. sec.* 21.

In addition to the above provision of the Revised Statutes, the one hundred and seventy-third section of the Code of Procedure has been made applicable to these proceedings. *Laws of* 1857, *vol.* 2, *p.* 504; *Pub. Acts*, *p.* 184. That section authorizes the court either before or after judgment, in furtherance of justice, and on such terms as may be proper, to amend any pleading or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the

name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved. *See* § 173, *in Voorhies' Code and Notes; and see* 25 *Barb.* 336, *aff.* 6 *Abb. Pr. R.* 350.

Judgment of Partition.] The court is required to ascertain, from the proofs taken upon the reference in case of default; or from the confession, by plea, of the parties if they appeared; or from the verdict of the jury by which any issue of fact shall have been tried; and to declare,—the rights, titles, and interest of the parties to such proceedings, plaintiffs as well as defendants, so far as the same shall have appeared; and to determine the rights of the parties in such lands, tenements, or hereditaments, and give judgment that partition be made between such of them as shall have any right therein according to such rights. (*a*) 2 *R. S.* 321, *sec.* 23; 23 *Barb.* 286, 302. For forms, see *Appendix*, No. 209.

If the defendants sign a cognovit, acknowledging the correctness of the allegations contained in the petition, and consenting that partition may be made of the premises therein described, the judgment for partition is founded upon the confession, and is limited by it; and the court has no authority to go beyond it. 21 *Barb.* 9.

The court is not restricted to a partition of all the lands, or a sale of the whole. And, therefore, where the interests of the parties require it, part of the lands held in common may be divided, and part of them sold. *See* 2 *R. S.* 323, *sec.* 37; *Ib.* 330, *sec.* 81; 4 *Barb.* 228; 9 *Id.* 500. And so, when

(*a*) Where one tenant in common lays out money in improvements on the estate, although the money so expended does not in strictness constitute a lien upon the estate, yet a court of equity will not grant a partition without first directing an account and a suitable compensation; or else in the partition it will assign to such tenant in common that part of the premises on which the improvements have been made. 1 *Barb. S. C. R.* 505, per Paige, J.; and see 3 *Paige*, 546; 3 *Sand. Ch. R.* 64. And see as to other cases of equitable partition, 3 *Paige*, 200; *Ib.* 470.

a portion of the premises may, without prejudice to the interests of any of the parties, be allotted to one of the parties, but the shares of the other parties cannot be allotted to them without prejudice to their interests, the court may allot to the former party his share in the premises, and direct a sale of the interests of the other parties in the residue which cannot be so divided. 4 *Barb.* 228, *supra.*

Where the proceedings are instituted in behalf of infants, a partition of the premises will not be directed by the court unless it is made satisfactorily to appear that the interests of such infants require it. *See Laws of* 1852, *p.* 411, *sec.* 2.

Judgment as to Part of the Owners, &c.] If, after the trial of any such issues, or after judgment by default, confession, or otherwise against those parties who are known, the part or interest of any parties who shall not have pleaded in the cause, whether known or unknown, in and to such premises, shall not have appeared by the evidence in the cause, then the said court shall give judgment that partition be made, so far as the rights or interests of the parties who are known, and who have appeared in the cause, have been ascertained; and the residue of the premises shall remain for the parties whose interests have not been ascertained, subject to division between them at any future time. 2 *R. S.* 321, *sec.* 24.

And an actual partition or sale, as the case may require, may be adjudged or decreed, whenever and as often as the court shall have ascertained and declared so many facts concerning the rights, titles, and interests of all or any of the parties to such suit, that a fair and just partition or distribution of the proceeds can be made by assigning to any party or parties, in severalty, and to any set or sets of parties in common, according to the provisions of this or the next section (*sec.* 2, *Laws of* 1847, *post*), the shares in the premises belonging to such parties and sets of parties respectively, or of the proceeds of the sales of the said shares of such parties and sets of parties respectively. *Laws of* 1847, *p.* 556, *sec.* 1.

And whenever a partition or sale shall be so adjudged or decreed, costs may be awarded as shall seem just, and the

court may take order to discharge from the suit any party or parties whose interest therein shall have wholly ceased, and for the custody of any lands or shares of proceeds, as to which the rights, titles, and interests of the parties shall not have been fully ascertained and declared, and for such further proceedings as may be requisite, until the full ascertainment and declaration of the rights, titles, and interests of all the parties. *Ib.*

Shares or Proceeds may be temporarily set off.] When it shall seem proper to the court that a partition or sale should be adjudged, as provided in the preceding section (*Laws of* 1847, *sec.* 1), shares of the premises or proceeds as to which there are conflicting claims not affecting other shares in the premises or proceeds, may temporarily, and until the determination of such claims upon further proceedings had between the adverse claimants, be assigned or set off as in common to such adverse claimants, with a proper reservation of the questions of right between such claimants. *Ib. sec.* 2.

Whenever it shall appear on such further proceedings as are mentioned in the last two preceding sections, that any amendment of the pleadings or proceedings is necessary in respect to any share in controversy, such amendment may be introduced by suggestion to be filed; saving to all parties in interest, the like right to answer such suggestion as in the case of an amendment of the petition. *Ib. sec.* 3.

Shares may be set off to Parties in Common.] If it shall appear to the court that two or more persons interested in the premises, are desirous of enjoying their several shares or interests in common with each other, the court may direct a partition to be made in such manner as to set off to such of the parties as shall desire it, their shares respectively of such premises, and shall permit the respective shares or interests of those who shall desire it to remain without partition or allotment, to be enjoyed by them in common. *Ib. sec.* 4; *and see* 2 *Wend.* 443.

And for that purpose, where there is no issue formed by

the pleadings to prevent it, the court will order a reference to ascertain and report whether the shares of any of the parties can be set off to them in common. 8 *How. Pr. R.* 351. Such reference should be had before the final judgment in partition is entered. *Ib.*

Commissioners to be Appointed.] When judgment of partition shall be rendered, the court is required to appoint, by rule, three reputable freeholders, commissioners to make the partition adjudged, according to the respective rights and interests of the parties, as the same were ascertained and determined by such court; and in such rule the court shall designate the part or share which shall remain undivided, for the owners whose interests shall be unknown and not ascertained. 2 *R. S.* 321, *sec.* 25. For form, see *Appendix*, Nos. 209, 244.

The commissioners are named by the party to the court, and if approved of, appointed, according to the nomination. 1 *Cai. R.* 121, 122; 4 *Barb.* 228, 232.

If the persons appointed commissioners, or any of them, shall die, resign, or neglect to serve, the court may, from time to time, appoint others in their places. 2 *R. S.* 321, *sec.* 26.

Oath of Commissioners.] The commissioners, before proceeding to the execution of their duties, shall severally be sworn or affirmed, before any officer authorized to take affidavits, honestly and impartially to execute the trust reposed in them, and to make partition as directed by the court; which oath shall be filed with the clerk of the court, at or before the coming in of the report of such commissioners. *Ib. sec.* 27. For form, see *Appendix*, No. 218.

Partition by Commissioners.] The commissioners are required to proceed forthwith to make partition, according to the judgment of the court, unless it shall appear to them, or any two of them, that partition cannot be made without great prejudice to the owners thereof; in which case they

shall make a return of such fact to the court, in writing, under their hands. 2 *R. S.* 322, *sec.* 28.

Notice of the proceedings should be given to the parties interested. 9 *How. Pr. R.* 71. Although the statute does not in terms require such notice, yet the necessity of it must be implied; for partition is one of those adjudications of a judicial nature affecting the rights and interests of the parties, in which they have a right to substantial and beneficial notice, and without it the report of the commissioners will be set aside. *Ib.;* but see 4 *How. Pr. R.* 133.

In making partition, the commissioners shall divide the real estate, and allot the several portions and shares thereof to the respective parties, quality and quantity relatively considered by them, according to the respective rights and interests of the parties so adjudged by the court, designating the several shares and portions by posts, stones, or other permanent monuments; and they may employ a surveyor, with the necessary assistants, to aid them therein. 2 *R. S.* 322, *sec.* 29.

But if the court shall direct that the shares of two or more of the parties shall be set off to them in common, the order of the court, in this respect, must be followed by the commissioners; and the partition, in such case, must be made in such manner as to set off to such parties their shares or interests in common, dividing the remainder of the premises between the parties according to their respective rights in the same. *See Laws of* 1847, *p.* 556, *sec.* 4, *supra;* 2 *Wend.* 443; 8 *How. Pr. R.* 351.

The commissioners in making partition may assign a portion of the premises, held in common, to one of the parties, charged with a servitude or easement, for the benefit of another party, to whom a distinct portion of the premises is assigned in severalty. 10 *Paige*, 470.

And so, where the premises in question consist of a mill-dam and mill-pond, creating the water-power which supplies the mills held in severalty by the tenants in common of such mill and mill-pond, the commissioners may divide the mill-dam, and the lands under the same, and under the waters of

the pond, and may make such provision for keeping the different portions of the dam, and of the water-gates and flumes in repair, and such regulations for the use of the water-power, which is not capable of actual partition without a destruction of its value, as the parties themselves might make by a partition deed of the same property. *Ib.; and see* 14 *Wend.* 204; 5 *N. Hamp. R.* 134.

If the commissioners do not partition the tract described in the petition, but extend their action to land consisting partly of a portion of such tract and partly of other property, their proceedings would be without jurisdiction, and the judgment entered upon their report, would be void. 21 *Barb.* 9.

Where infants represent a share of the property, their separate proportions of it should be severed and set out to them respectively. It is not enough merely to set aside for them, collectively, the share of their ancestor. 3 *Edw.* 229.

All the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met, shall be valid. 2 *R. S.* 322, *sec.* 31.

Compensation for Equality of Partition.] The statute provides that whenever partition shall be decreed by a court of equity (now the Supreme Court), (*a*) if it shall appear that it cannot be made equal between the parties, without prejudice to the rights and interests of some of them, the court may decree compensation to be made by one party to the other, for equality of partition, according to the equity of the case. 2 *R. S.* 330, *sec.* 83; 2 *Paige*, 27; 4 *Barb.* 229; *Will. Eq. Jur.* 700, 705.

Partition of Interest of Tenants for Life.] Whenever the estate of any tenant in dower, or by the curtesy, or for

(*a*) See *Const., art.* 6, § 3; 3 *Kern.* 493; *Laws of* 1847, *p.* 323, *sec.* 16. In *actions*, however, for the partition of real estate, under the Code of Procedure, all the courts having jurisdiction of such actions (*ante p.* 332, *and note* (*b*) may direct compensation to be made for equality of partition. *Code of Pro.* §§ 8, 448.

life, to the whole or any part or share of the premises in question, has been admitted by the parties, or ascertained by the court to be existing at the time that judgment shall be given that partition be made, and the person entitled to such estate has been made a party to the proceedings, it shall be lawful for the commissioners to allot to such tenant his share thereof, without reference to the duration of such estate; and, also, to make partition of such share, and allot the same to the parties respectively who shall be entitled to the remainder thereof, according to their respective rights therein, whenever in the opinion of the commissioners, it can be done without prejudice to the rights of the parties. *Laws of* 1847, *p.* 556, *sec.* 5; 15 *New York R.*, 623, 627.

Formerly, in the proceedings for partition, an admeasurement of a dower interest in the premises could not be made, 1 *Barb. S. C. R.* 561; 3 *Sand. S. C. R.* 391; 15 *Johns.* 319; but the statute above cited undoubtedly contemplates an admeasurement of the widow's dower, where she has been made a party to the proceedings, whether the dower extends to the whole or to only a part, of the premises in question.

Fees and Expenses of Commissioners, Surveyors, &c.] The expenses of the commissioners, including the expenses of a surveyor and his assistants, when they shall be employed, will be ascertained and allowed by the court; and the amount thereof, together with the fees allowed by law to the commissioners, must be paid by the plaintiffs, and will be allowed to them as part of the costs to be taxed. 2 *R. S.* 322, *sec.* 32.

The fees allowed by law to commissioners are two dollars to each for every day's actual and necessary service. (*a*) *Id.* 643, *sec.* 35. And the surveyor, if one is employed, is allowed for actual service in surveying, laying out, marking, and mapping the premises of which partition is made, two dollars

(*a*) The commissioners must look to the plaintiff for their fees, and not to the plaintiff's attorney; and, it seems, the attorney is not liable to the commissioners, though the fees have been collected by him. At any rate, he can not be attached for not paying them. 4 *How. Pr. R.* 245.

and fifty cents per day; and for each of his necessary chain and flag bearers, and other necessary assistants, one dollar per day. *Ib. sec.* 34.

Commissioners' Report.] The commissioners are required to make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust, and describing the land divided, and the shares allotted to each party, with the quantity, courses, and distances of each share, and a description of the posts, stones, or other monuments thereof, and the items of their charges. 2 *R. S.* 322, *sec.* 30. For forms, see *Appendix*, Nos. 219, 245, *notes.*

The report should be signed by all of the commissioners; if not, it should state the reason of the omission. And where a sufficient reason is given for its not being signed by all, it should also state that all the commissioners met together and consulted upon the matter of the partition. 1 *Barb. Ch. R.* 73; *and see* 2 *Hill*, 625.

The report must also be proved or acknowledged before some officer authorized to take the proof of deeds, in the same manner that deeds are required to be proved or acknowledged to entitle them to be recorded (1 *R. S.* 756, *sec.* 4); and must be filed in the office of the clerk of the court. 2 *R. S.* 322, *sec.* 33.

Setting aside Report.] On good cause shown, the court may set aside the report, and appoint new commissioners as often as may be necessary, who will proceed in like manner as above directed. *Ib. sec.* 34.

But, it seems, the report will be disturbed or interfered with by the court, only upon grounds similar to those upon which a verdict would be set aside and a new trial granted. 9 *How. Pr. R.* 71; 4 *Ed. Ch. R.* 896. And the affidavits of four credible and disinterested persons for, to three against, setting aside such report, does not carry such a weight of evidence as to authorize the court to interfere to disturb the report. 9 *How. Pr. R.* 71, *supra.*

Where one of the parties opposed the confirmation of the report upon the ground that he was not notified of the meeting of the commissioners, and did not attend, it was held that the proceedings were irregular for that reason, and the report was set aside. *Ib.*

Judgment on Report.] The party instituting the proceedings should move the court for the confirmation of the report of the commissioners, and that final judgment be rendered upon it. Notice of the motion should be served upon the parties interested, who have appeared in the proceedings, accompanied with copies of the papers on which the motion is founded. For form, see *Appendix*, No. 220.

Upon the report of the commissioners being confirmed by the court, judgment will thereupon be given that such partition be firm and effectual forever. 2 *R. S.* 322, *sec.* 35.

How Judgment Perfected.] The judgment is perfected by making up and filing a proper record of the proceedings, and taxing the costs. See 2 *Burr. Pr.* 351. For form of judgment record, see *Appendix*, No. 221.

But the judgment is binding upon the parties, in respect to the actual partition of the premises, from the date of the confirmation of the commissioners' report, without regard to the subsequent completion of the record. 9 *Barb.* 500.

Where part of the premises of which partition is sought, belongs to unknown owners, the judgment is not valid unless it appear upon the face of the record that the affidavit required by the statute, that the plaintiff is ignorant of the names, rights, or titles of such owners, was duly presented to the court, and that the notice also required in such cases was duly published. 11 *Wend.* 648; *and see Lal. Supp. to Hill & Denio*, 440. It seems, however, that a final judgment in partition against unknown owners, though obtained without the publication of any notice, is not absolutely void so as to be impeachable collaterally, but is merely irregular. 2 *Hill*, 625, 627.

The Record of Judgment may be recorded.] An exemplification of the judgment record may be recorded in the clerk's office of any county of the State in which any lands described therein may be situated, in the same manner that conveyances of real estate are now authorized to be recorded. *Laws of* 1846, *p.* 204, *sec.* 2. And it may, also, in like manner be recorded in the office of the register of the city and county of New York. *Laws of* 1851, *p.* 555.

Such record, or an exemplification thereof, shall be received in evidence, and shall be as effectual in all cases as the original exemplification would be, if produced, and shall be open to the same objections. *Laws of* 1846, *p.* 204, *supra.*

Effect of such Judgment.] The statute declares the judgment rendered upon the confirmation of the report of the commissioners, to be binding and conclusive,—

1. On all parties named therein, and their legal representatives, who shall, at the time, have any interest in the premises divided, as owners in fee, or as tenants for years, or as entitled to the reversion, remainder, or inheritance of such premises after the termination of any particular estate therein; or who, by any contingency contained in any will or grant or otherwise, may be or may become entitled to any beneficial interest in the premises; or who shall have any interest in any undivide dshare of the premises, as tenant for years, for life, by the curtesy, or in dower;

2. On all persons interested in the premises, who may be unknown, to whom notice shall have been given of the application for partition, by such publication as is hereinbefore directed; and,

3. On all other persons claiming from such parties or persons, or either of them. 2 *R. S.* 322, *sec.* 35.

But such judgment and partition shall not affect any tenants, or persons having claims as tenants, in dower, by the curtesy, or for life, to the whole of the premises which shall be the subject of such partition; nor shall such judgment and partition preclude any person except such as are specified in the last section, from claiming any title to the premises in

question, or from controverting the title or interest of the parties, between whom such partition shall have been made. *Ib. sec.* 36; *and see Laws of* 1847, *p.* 556, *sec.* 5; 15 *New York R.* 625.

Effect of Partition upon Creditors.] The statute provides that the partition of the premises shall not alter, affect, or impair the lien of any creditors by judgment, decree, mortgage, or otherwise, except that where the lien is on the undivided interest or estate of any of the parties, such lien, if partition be made of the premises, shall thereafter be a charge only on the share assigned to such party. 2 *R. S.* 318, *secs.* 8, 9.

And such share shall be first charged with its just proportion of the costs of the proceedings in partition, in preference to any such lien. *Ib.*

When Sale of Premises will be ordered.] If it shall appear to the commissioners that the premises of which partition is directed to be made, or any distinct lot, tract, or portion thereof, is so situated that a partition thereof cannot be made without great prejudice to the owners, they are required to report the fact to the court. 2 *R. S.* 322, *sec.* 28; *Ib.* 323, *sec.* 37. For form, see *Appendix*, No. 223.

And the court is only authorized to direct a sale of the premises where they are so situated that a partition thereof cannot be made without great prejudice to the owners. The statute here refers to comparative prejudice between an actual partition and a sale; and its language will not justify a sale where the aggregate amount of benefits from a sale, instead of a partition, will be small in reference to the value of the property. 10 *Paige*, 470; 2 *Barb. S. C. R.* 599. The prejudice spoken of means a prejudice to all the owners, and not to a part only. And a sale will not be ordered merely because it would be more profitable to one of the parties than a partition. *Ib.* Nor is it sufficient to justify the court in directing a sale of the premises, that large arrears of taxes and assessments remain unpaid. 11 *How. Pr. R.* 489.

Where lands leased for a term of years are owned by several persons as tenants in common both of the rents and of the reversion, and the premises, in proceedings for partition, are directed to be sold, the sale must be made subject to the rights of the lessees, who, by the sale, will become the tenants to the purchasers of the rents and reversion. 5 *Paige*, 518.

The court is not restricted to a partition of all the lands, or a sale of the whole; and where the interests of the parties require it, part of the lands held in common may be divided, and part of them sold. 4 *Barb.* 228; 9 *Id.* 500. And so, a portion of the premises may be allotted to one of the parties, and the shares of the other parties may be sold, where the interests of the parties require it. 4 *Barb.* 228; and see *ante*, *p.* 338, "Judgment of Partition."

If, upon the report of the commissioners being made, the court is satisfied that such report is just and correct, the court will thereupon, by a rule to be entered on the filing of the report, order the commissioners to sell the premises so situated, at public auction to the highest bidder. *Ib. sec.* 37. For form, see *Appendix*, No. 227. But the court must be satisfied that a necessity for such order exists. The report, therefore, should set forth the facts and circumstances upon which the opinion of the commissioners is founded, so that the court may be enabled to judge as to the propriety of a sale. 19 *Wend.* 226.

And where the proceedings are instituted in behalf of infants, a sale of the premises will not be directed unless it also appears satisfactorily to the court, that the interests of such infants require it. *See Laws of* 1852, *p.* 411, *sec.* 2.

Creditors to be brought in, &c.] Before the making of any order for the sale of the premises, where the creditors having specific liens shall not have been made parties, the court, on the motion of either party, will direct the plaintiff to amend his petition, by making every creditor having a specific lien on the undivided interest or estate of any of the parties, by mortgage, devise, or otherwise, a party to the proceedings; and will also direct the clerk of the court to

ascertain and report whether the shares or interests in the premises of the parties in the suit, or any of them, are subject to any general lien or incumbrance by judgment or decree. (*a*) 2 *R. S.* 324, *sec.* 42, *as amended by Laws of* 1830, *chap.* 320. For form, see *Appendix*, No. 224.

The order directing the clerk to report as to liens, &c., in proceedings in the Supreme Court, is usually embodied in the order of reference as to the propriety of a sale. See *post*, *p.* 357, "Proceedings for a sale by a Referee."

But a reference is not indispensable; and an order for the sale of the premises may be made without such reference, unless it is asked for by one of the parties. 12 *Wend.* 269; 10 *How. Pr. R.* 188; *but see* 4 *Paige*, 481.

If a reference is ordered, the referee is required immediately thereafter to cause a notice to be published once in each week for six weeks successively, in the State paper, and also in a newspaper printed in every county in which any of the lands in question are situated, requiring all persons having any general lien or incumbrance on any undivided interest or share therein, by judgment or decree, to produce to the referee on or before a certain day to be named in such notice, proof of all such liens and incumbrances, together with satisfactory evidence of the amount due thereon; and the referee shall report, with all convenient speed, the names of the creditors, the nature of the incumbrances, the dates thereof, and the several amounts appearing to be due thereon. 2 *R. S.* 324, *sec.* 43, *as amended by Laws of* 1830, *chap.* 320. For form of notice, see *Appendix*, No. 225.

But it is not necessary to advertise for persons having general liens by judgment or decree to present their claims to the referee, &c., in order to render the sale regular and valid. The reference and the advertisement are only intended as a means of cutting off certain general liens. If there are no such liens, there is no use of the advertisement; and if

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(*a*) The reference may also be made to the county judge, or local officer elected to discharge the duties of county judge and surrogate, or other suitable person or persons. *Laws of* 1847, *p.* 344, *sec.* 77.

the parties know there are none, there is no reason why they should be subjected to the expense and delay of a reference and advertisement which must end in nothing. If the advertisement is omitted, and there are in fact such liens, the purchaser, on examining the title, would discover them, and decline to take the title until the liens were discharged, and so no one would be injured. 10 *How. Pr. R.* 181, 190, per Mitchell, J.

Where the interest of one of the parties in the premises is sold under a judgment against him subsequent to the filing of the petition and notice of lis pendens, the purchaser must come in before the referee and prove his claim under the order of reference as to general liens; as his interest in the premises will be divested by a sale under the judgment in partition. *See* 7 *Paige*, 550.

The object of the reference is to enable the court to distribute the purchase money in a proper manner; and if the referee reports against the claim of any person having a lien, by judgment or decree, upon the share of any of the parties, the claimant should except to the report within the time prescribed by the rules, to preserve his lien upon the purchase money, which, by the statute, becomes a substitute for the land itself. *See* 4 *Paige*, 441, 442. For form of referee's report, see *Appendix*, No. 226.

Upon the coming in of the report of the referee, the same must be filed, and a note of the day of the filing must be entered by the clerk in the proper book, under the title of the cause or proceeding, and the report will thereupon become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the same. *Sup. Court Rules*, 1858, No. 32.

If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein. *Ib.*

Order to bring Portions of Purchase Money into Court.] If it shall appear by the proceedings on such petition, or by

such report, that there are any existing incumbrances upon the estate or interest in the premises of any party named in the proceedings in the suit, the court will, in the order of sale, direct the commissioners to bring into court and pay to the treasurer of the county, the portion of the moneys arising from the sale of the estate and interest of such party, after deducting the portion of the costs, charges, and expenses to which it shall be liable. 2 *R. S.* 324, *sec.* 44; *Laws of* 1848, *p.* 404; *Laws of* 1847, *p.* 340, *sec.* 71; *Sup. Court Rules*, 1858, No. 81.

Terms of credit.] The court must direct in the order of sale, the terms of credit which may be allowed, for any portions of the purchase money of which it shall think proper to direct the investment, and for such portions of such purchase money as are required, by the provisions herein, to be invested for the benefit of any unknown owners, any infants, any parties out of the State, or any tenants for life, in dower, or by curtesy. 2 *R. S.* 323, *sec.* 38.

Sale of Dower or other Life Estate in Premises.] Whenever the estate of any tenant in dower, or by the curtesy, or for life, to the whole or any part or share of the premises in question, has been admitted by the parties, or ascertained by the court, to be existing at the time of the order for such sale, and the person entitled to such estate has been made a party to the proceedings, the court is required first to consider and determine, under all the circumstances of the case, whether such estate ought to be excepted from such sale, or whether the same should be sold; and in making such determination, they shall have regard to the interests of all the parties. *Ib.* 325, *sec.* 50; 7 *Paige*, 406; 15 *New York R.* 625; *and see post. p.* 366.

Notice of Sale.] The commissioners are required by the statute, to give notice of any sale to be made by them, for the same time and in the same manner, as is required by law on sales of real estate by sheriffs on execution. *Ib.* 326, *sec.* 56.

The time and place of holding any such sale, therefore, must be publicly advertised, previously, for six weeks successively, as follows:

1. A written or printed notice thereof must be fastened up in three public places in the town where the real estate is to be sold; and if such sale be in a town different from that in which the premises to be sold are situated, then such notice must also be fastened up in three public places of the town in which the premises are situated;

2. A copy of such notice must be printed once in each week in a newspaper of such county, if there be one;

3. If there be no newspaper printed in such county, then the notice must be published in the State paper once in each week. *Ib.; and see* 2 *R. S.* 368, *sec.* 34. For form of notice, see *Appendix*, No. 228.

All the other provisions of the title of the Revised Statutes in relation to the notice of sale by sheriffs on execution (2 *R. S.* 368, 369, 370), are also made applicable to sales of lands under a judgment in partition. 22 *Barb.* 167. And therefore, the section of the statute which provides that the omission of the sheriff to give notice of sale under an execution, shall not affect the validity of any sale made to a purchaser in good faith, without notice of any such omission, applies to sales under judgments in these proceedings. *Ib.*

In sales in the city of New York, the notice must be for six weeks, the statutory time; and the rule of the Supreme Court (No. 73), providing for a notice of three weeks on the sale of lands lying in any of the cities of this State, has no application to sales under a judgment in partition. 5 *How. Pr. R.* 318.

Proceedings on Sale.] The commissioners should meet at the time and place designated in the notice, and then and there sell the premises, at public auction, to the highest bidder. (*a*)

(*a*) No order to stay the sale of the premises can be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney. *Sup. Court Rules*, 1858, *No.* 80.

If the premises consist of distinct buildings, farms, or lots, they must be sold separately. 2 *R. S.* 326, *sec.* 57.

Neither of the commissioners, nor any person for the benefit of either of them, shall be interested in the purchase, nor directly nor indirectly purchase any of the premises sold; nor shall any guardian of any infant party in such suit purchase, or be interested in the purchase of, any lands being the subject of such suit, except for the benefit or in behalf of such infant; and all sales contrary to the provisions of this section, shall be void. *Ib. sec.* 58; 22 *Barb.* 168. And where the purchase is made by the guardian of an infant, but not for the benefit of such infant or in his behalf, the sale is void, notwithstanding the purchase was not made by such guardian for his own benefit, but as agent for others. *Ib.*

The terms of the sale must be made known at the time. 2 *R. S.* 326, *sec.* 57. With respect to the terms of credit, these may be determined or ascertained, by reference to the order of the court directing the sale. *Ib.* 323, *sec.* 38.

The portions of the purchase money for which credit shall have been allowed, must always be secured, at interest, by a mortgage of the premises sold, by a bond of the purchaser, and by such other security as the court shall prescribe. *Ib. sec.* 39.

And the commissioners may take separate mortgages and other securities, for such convenient shares or portions of the purchase money, as are directed by the court to be invested as aforesaid, in the name of the treasurer of the county in which the premises are situated, or his successors in office, and for such shares as any known owner of full age shall desire to have so invested, in the names of such owners. *Ib. secs.* 40, 41; *Laws of* 1848, *p.* 404; *Laws of* 1847, *p.* 340, *sec.* 71.

Upon such sales being confirmed by the court, the commissioners are required to deliver the mortgage or other securities, so taken by them, to the treasurer of the county, or to the known owners whose shares were so invested. *Id.*

Report of Sale.] After completing the sale, the commis-

sioners are required to report the same to the court, on oath, with a description of the different parcels of land sold to each purchaser, the name of such purchaser, and the price bid by him; which report shall be filed in the court, 2 *R. S.* 327, *sec.* 59. For form, see *Appendix*, No. 229.

Order thereupon; Conveyance to Purchaser, &c..] If the sale is approved and confirmed by the court, an order must be entered, directing the commissioners, or any two of them, to execute a conveyance pursuant to such sale; which they are authorized by statute to do. 2 *R. S.* 327, *sec.* 60. Such conveyance, when executed, must be recorded in the county where the premises are situated. *Ib. sec.* 61.

But the purchaser would not be compelled to complete the purchase, where there has been unreasonable delay in perfecting the title; and where the delay was ten months, it was held to be unreasonable, and an order to compel the purchaser to take the title, was refused. 22 *Wend.* 498. Nor will the court compel him to take the title where the completion of the sale has been delayed so long, by the fault of the parties, that he cannot have the benefit of his purchase substantially as if the sale had been completed at the time contemplated by the terms of sale. 7 *Paige*, 387. Nor would the purchaser, where the premises are not sold at his risk, be compelled to complete the purchase, in case the premises should be incumbered, or no title should pass by the sale, or there should be difficulty in obtaining possession. 1 *Paige*, 120. But he would not be permitted to object to the title merely on the ground that there is a possibility that some person, other than the parties in the suit, has an interest in the premises, where there is no probability that any such interest exists. 4 *Paige*, 441. And so, where all the necessary parties are joined, it is no excuse for refusing to take the title that there are errors in stating the interests and shares of the parties, or any omission to state what on motion the plaintiff might have been compelled to insert by way of amendment. 6 *Abb. Pr. R.* 59. And so, it is immaterial that the plaintiff omitted to allege that there were no incumbrances; or that

the referee omitted to annex searches for incumbrances to his report. *Ib.* And see in reference to the same subject, 10 *How. Pr. R.* 189; 13 *Id.* 476; 15 *New York R.* 617; 2 *Abb. Pr. R.* 7; 6 *Id.* 350.

Effect of Conveyance.] The conveyance so executed by the commissioners, is declared by the statute to be a bar, both in law and equity, against all persons interested in such premises in any way, who shall have been named as parties in the proceedings; and against all such persons and parties as were unknown, if notice shall have been given of the application for partition, by such publication as is before directed; and against all other persons claiming from such parties, or any of them. 2 *R. S.* 327, *sec.* 61; *and see Ib.* 330, *sec.* 84; 3 *Paige*, 653.

The conveyance will also, under the statute, operate to cure any defect or irregularity in the notice of sale. 22 *Barb.* 167.

And it will also be a bar against all persons having general liens or incumbrances by judgment or decree on any undivided share or interest in the premises sold, in all cases where the notice to such creditors, prescribed by the statute, shall have been given; and also against all persons having specific liens on any undivided share or interest therein, who shall have been made parties to the proceedings. *Laws of* 1830, *chap.* 320, *sec.* 45, *added to* 2 *R. S.* 327; 4 *Paige*, 441.

But no creditor having a specific lien on any undivided share or interest in the premises, will be affected by such sale or conveyance, unless he is made a party to the proceedings. *Id. ibid.*

If a mortgage, however, is given on an undivided share of the premises, pending the proceedings for partition, the lien of the mortgagee will be divested by a sale of the premises under the judgment of the court, and the purchaser will take the estate discharged from the incumbrance. 1 *Paige*, 484. And so also, the same result will follow if a judgment is recovered during the pendency of the proceedings. 8 *Id.* 643.

The legal lien, in such cases, is converted into an equitable lien upon the fund produced by the sale; to the same extent as the legal lien. *Ib.; and see* 4 *Id.* 442.

Costs and Expenses.] The costs and expenses of the proceedings shall be deducted from the proceeds of every sale made by the commissioners; and shall be by them, in the first instance, paid to the plaintiffs, or their attorney. 2 *R. S.* 327, *sec.* 62; 1 *Barb. S. C. R.* 561, 564. And see *post, p.* 369, "Costs of Proceedings."

A party entitled to dower in the premises sold, where she has been made a party to the proceedings, is obliged to contribute towards the costs and expenses. 2 *R. S.* 326, *sec.* 54; 1 *Barb. supra.*

Proceedings for a Sale by a Referee.] Instead of appointing commissioners in the first instance to make partition, where the proceedings are in the Supreme Court, (*a*) if it appears by the report of a referee, or otherwise, that the premises or any part of them, are so circumstanced that a

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(*a*) The practice here considered, in proceedings instituted by *petition*, under the statute, is undoubtedly confined to the Supreme Court. The late Court of Chancery entertained jurisdiction in partition either by bill or petition, 2 *R. S.* 329, *sec.* 79; and it was the only court, having jurisdiction in these proceedings, that could direct a reference as to the propriety of a sale, instead of appointing commissioners. And this it could do in either mode of proceeding. The Supreme Court, being now the only court having general jurisdiction in equity, it may, like the Court of Chancery in proceedings for the partition of real estate commenced by petition, direct a reference in the first instance as to the propriety of a sale. *See Laws of* 1847, *p.* 323, *sec.* 16; 3 *Kern.* 493. And it may, also, like that court, where the premises are ordered to be sold, direct the sale to be made by a referee, to be appointed for that purpose. 2 *R. S.* 330, *sec.* 81.

But the practice above considered, is applicable to all the courts having jurisdiction of the proceeding by *action* under the Code of Procedure. *See Code of Pro.* §§ 8, 448, 33, 123; 2 *Abb. Pr. R.* 18. And in such case, where a sale of the premises is ordered, the court may direct it to be made by a referee appointed for that purpose, or by the sheriff of the county where the premises are situated. 2 *R. S.* 330, *sec.* 81; *Code of Pro.* § 287; 2 *Abb. Pr. R.* 18; *and see Laws of* 1847, *p.* 344, *sec.* 77.

partition thereof cannot be made without great prejudice to the owners, the court may order a sale of such premises at public auction, by a referee, upon the same notice, and in the same manner as in sales by commissioners; and on the referee's report being confirmed, he is required to execute conveyances to the purchasers, at such sales, which shall have the same effect as if executed by commissioners, as before prescribed. See 2 *R. S.* 330, *sec.* 81; *Laws of* 1847, *p.* 344, *sec.* 77; 2 *Abb. Pr. R.* 16, 18.

And the court may, in like manner as is provided where commissioners are appointed, amend the petition and other pleadings, with the like saving to the parties affected thereby; and may award one or more issues to try any fact contested by the parties. 2 *R. S.* 330, *sec.* 81.

The practice under the above statutory provisions is regulated in part by Rule 79 of the Supreme Court, which provides, that where the whole premises of which partition is sought, are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality, or where any lot, or separate parcel of the premises, which will exceed in value the share to which either of the tenants in common may be entitled, is so circumstanced, the plaintiff, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference under the 78th Rule (*ante*, *p.* 334), may have a further provision inserted in such order of reference, directing the officer or person to whom it is referred, to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and that if he arrives at the conclusion that the sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such a case, that he also ascertain and report

whether any creditor not a party to the suit, has a specific lien, by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to a general lien or incumbrance, by judgment or decree; and that he ascertain and report the amount due to any party to the suit, who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. The referee shall, also, if requested by the parties who appear before him on such reference, ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser; to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds thereof on such sale. *Sup. Court Rules*, 1858, *No.* 79.

The true question to be considered by the referee in determining whether a sale of the premises is necessary, is whether the aggregate value of the several parcels into which the whole premises must be divided, will, when distributed among the different parties in severalty, be materially less than the value of the same property, if owned by one person. 6 *Paige*, 541, 547.

The 79th Rule, so far as it relates to the inquiries before the referee, as to the necessity of a sale, is founded upon the 81st section of the statute (*supra*); and that part of the rule which requires the examination as to liens and incumbrances, is in pursuance of the 42d section of the statute. See 2 *Barb. Ch. Pr.* 305.

The proceedings, in cases of reference under the statute, are substantially the same as before commissioners; as to which, see *ante*, *pp.* 333, 348, 349 *to* 351; and see 2 *Barb. Ch. Pr.* 304. And for forms, see *Appendix*, No. 239 to 260.

Proceeds of Sale.] The proceeds of every sale, after deducting the costs, shall be divided among the parties whose rights and interests shall have been sold, in proportion to their respective rights in the premises; and the shares of such of the parties as are of full age, shall be paid to them or their legal representatives by the commissioners, or shall be brought into court for their use. 2 *R. S.* 327, *sec.* 63; 16 *Barb.* 531.

If the shares are brought into court, they should be deposited with the treasurer of the county in which the premises sold are situated. *Laws of* 1848, *p.* 404; *Laws of* 1847, *p.* 340, *sec.* 71; *Sup. Court Rules*, 1858, No. 81.

The proceeds of the sale are personal property; and upon the death of any of the parties, subsequent to the sale, they will descend to the personal representatives. 16 *Barb.* 531, 534.

Shares of Infants.] Where any of the known parties are infants, the court may, in its discretion, direct the shares of such infants to be paid over to their general guardian, or to be invested in permanent securities, at interest, in the name and for the benefit of such infants. 2 *R. S.* 327, *sec.* 64; 16 *Barb.* 531; 2 *Barb. Ch. R.* 314. And the shares ought not to be paid to the guardian ad litem of such infants. *Ib.*

But such shares, or any part thereof, will not be paid over to the general guardian, except so much thereof, or of the interest or income from time to time, as may be necessary for the support or maintenance of such infants; unless such guardian has previously given sufficient security on unincumbered real estate to account to such infants for the same, in the usual form. *Sup. Court Rules*, 1858, No. 70; and see *Code of Pro.* § 420; *Laws of* 1848, *p.* 407, *sec.* 8.

And no order shall be made for the payment of any such moneys to any person claiming the same, except upon petition,

accompanied by a certified copy of the order in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depositary of the money, showing the present state and amount of the funds, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee, to take proof and report thereon. *Sup. Court Rules*, No. 70, *supra*.

Where the lands of a wife who is an infant, are sold, the proceeds will not be paid to the husband, but will be directed to be brought into court, and to be secured for her use until she becomes of age. 1 *Paige*, 483.

If the shares of the infants are directed to be invested, they should be brought into court, and paid to the treasurer of the county for that purpose, *Sup. Court Rules*, 1858, No. 81; or, by an order of the Supreme Court, such investment may be directed to be made by and in the name of the guardian of such infants. *Laws of* 1848, *p.* 407, *sec.* 8; and see *ante*, *p.* 360.

Shares of Married Women.] When the lands of a married woman are sold, the proceeds will be directed to be paid to her, and not to her husband. See 11 *How. Pr. R.* 176; 8 *Id.* 389; 16 *Barb.* 532, 535. And where the order of the court directed the share of one of the heirs who was a married woman, to be paid to her husband, in right of his wife, and before actual payment the husband died, leaving his wife surviving,—it was held that the wife became reinstated in her original rights, and entitled to receive her share, not as her husband's widow, or representative, but as the heir of the original owner of the land. *Ib.*

If the wife whose lands are sold, is an infant, the proceeds will be directed to be brought into court, to be invested for her use, until she becomes of age. 1 *Paige*, 483.

With respect to the wife's inchoate right of dower in the

premises sold, see *post*, *p.* 367, "Rights of Married Women and others, having Future Interests in property."

Shares of Unknown and Absent Owners.] Where any of the parties whose interests have been sold, are absent from the State, without legal representatives in this State, or are not known or named in the proceedings, the court will direct the shares of such parties to be invested in permanent securities at interest, for the benefit of such parties, until claimed by them or their legal representatives. 2 *R. S.* 327, *sec.* 65; 16 *Barb.* 531.

Shares of Tenants for Life.] Where the proceeds of a sale, belonging to any tenant in dower, or by the curtesy, or for life, shall be brought into court as directed by the statute, the court shall direct the same to be invested in permanent securities at interest, so that such interest shall annually be paid to the parties entitled to such estates, during their lives respectively. 2 *R. S.* 327, *sec.* 66; 16 *Barb.* 531; and see *ante*, *p.* 360, "Proceeds of Sale."

And the party entitled to such interest shall be charged with the expense of investing such proceeds, and of receiving and paying over the interest or income thereof. *Sup. Court Rules*, 1858, No. 84.

But if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent. on the principal sum, during the probable life of such person, according to the Portsmouth or Northampton Tables. *Ib.* See the Northampton Tables in the *Appendix* to the *Supreme-court Rules.*

Security to Refund.] The court may, in its discretion, require all or any of the parties, before they shall receive any share of the moneys arising from such sale, to give security to the satisfaction of the court, to refund the said share with interest thereon, in case it shall thereafter appear

that such party was not entitled thereto. 2 *R. S.* 327, *sec.* 67.

In whose name Securities to be taken.] Where any security is directed to be taken by a court, or any investment to be made, or any security shall be taken by commissioners on the sale of any real estate, as herein directed, except where provision shall be made for taking the same in the name of any known owner, the bonds, mortgages, or other evidences thereof, shall be taken in the name of the treasurer of the county where the fund belongs, or such other county treasurer as the court shall direct, and his successors in office, who shall hold the same by virtue of their respective offices, and shall deliver them to their successors. *Ib.* 328, *sec.* 68.

And with respect to the shares or property of infants, the Supreme Court may order any bond, mortgage, or other securities, to be taken by and in the name of the guardian of such infants, to be collected and invested as such court shall direct. *Laws of* 1848, *p.* 407, *sec.* 8.

Treasurer to Receive Money, and Account, &c.] The treasurer is required to receive the interest or principal of any sums as they become due, and apply or re-invest the same, according to the circumstances of the case, as the court shall direct. 2 *R. S.* 328, *sec.* 69; *Laws of* 1848, *p.* 404. And he is required, also, at the first general term of the court, for the district in which he resides, in each year, to render an account to the court, in writing, and on oath, of all moneys received by him, and of the application thereof. And any neglect of that duty will subject him to suspension or removal from office. 2 *R. S.* 328, *sec.* 69; *Sup. Court Rules*, 1858, *No.* 82.

How Investments to be made.] All investments and reinvestments under the provisions of the statute, shall be made in the public stocks of the United States, or of this State, or on bond and mortgage upon unincumbered real estate of at

least double the value of such investment. 2 *R. S.* 328, *sec.* 70.

And no such security, bond, mortgage, or other evidence of such investment, shall be discharged, transferred, or impaired, by any act of the officer holding the same, without the order of the court, entered in the minutes thereof. *Ib.; and* 4 *Sand. Ch. R.* 51.

Suits in reference to such Investments.] The person interested in such investments or securities, may, with the leave of the court, prosecute the same in the name of the existing treasurer; and no suit shall be abated by the death, removal from office, or resignation of the officer to whom such evidences were executed, or of any of his successors. 2 *R. S.* 328, *sec.* 71; *Laws of* 1847, *p.* 340, *sec.* 71; *Laws of* 1848, *p.* 404.

Application to Court for Moneys.] Where there are existing incumbrances upon the estate or interest in the premises of any party to the proceedings, the court, as we have seen (*ante, p.* 351), is required, in the order of sale, to direct the commissioners, or referee, to bring into court the portion of the moneys arising from the sale of the interest of such party, after deducting the costs, charges, and expenses to which it shall be liable. 2 *R. S.* 324, *sec.* 44.

And such party is authorized to apply to the court to order such moneys, or such part thereof as he shall claim, to be paid to him; which application must be accompanied,—

1. By his own affidavit, stating the true amount actually due on each incumbrance, the owner of such incumbrance, and his residence, as far as known to such party;

2. By proof, by affidavit, of the due service of a notice on each owner of any incumbrance, of the intention to make such application, at least fourteen days previously.

If such owner reside in this State, such notice must be served personally, or if he be absent from his residence, by leaving a copy there, with some person of proper age. If such owner reside out of this State, such notice may be

served on him personally, twenty days previously, or by publishing the same in the State paper four weeks successively, once in each week. *Ib. sec.* 45.

Upon such application and proof of notice being made, the court will proceed to hear the proofs and allegations of the parties. *Ib. sec.* 46. For forms of affidavit, notice, &c., see *Appendix*, Nos. 236 to 238.

And if any question of fact arises, which, in the opinion of the court, cannot be satisfactorily determined without a trial by jury, the court will award a feigned issue, to be tried as in other cases. The costs of such trial must be paid by the party failing; which payment will be enforced by attachment, as in other cases. *Ib.*

Distribution of Moneys.] When the amount of existing incumbrances is ascertained, the court will proceed to order a distribution of the moneys so brought into and remaining in court, among the several creditors having such incumbrances, according to the priority thereof respectively. 2 *R. S.* 325, *sec.* 47.

Treasurer to have Incumbrances Discharged.] The statute makes it the duty of the treasurer, or other officer by whom any such incumbrance shall be paid off, to procure satisfaction thereof to be acknowledged, in the form required by law, and to cause such incumbrance to be duly satisfied or canceled of record, and to defray the expenses thereof out of the portion of the moneys in court belonging to the party by whom such incumbrance was payable. 2 *R. S.* 325, *sec.* 48; *Laws of* 1848, *p.* 404.

Other Parties not to be Delayed.] The proceedings to ascertain and settle the amount of incumbrances, as herein provided, are not to affect any other party in the suit for partition, nor delay the paying over or investing of moneys to or for the benefit of any party upon whose estate in the premises there shall not appear to be any existing incumbrances. 2 *R. S.* 325, *sec.* 49.

Proceedings on Sale of Dower, or Other Life Estate.] Whenever the estate of any tenant in dower, or by the curtesy, or for life, to the whole or any part or share of the premises in question, has been admitted by the parties, or ascertained by the court, to be existing at the time of the order for such sale, and the person entitled to such estate has been made a party to the proceedings, the court is required first to consider and determine, under all the circumstances of the case, whether such estate ought to be excepted from the sale, or whether the same should be sold; and in making such determination, they shall have regard to the interests of all the parties. 2 *R. S.* 325, *sec.* 50; 7 *Paige*, 406; 15 *New York R.* 625.

If a sale of the premises including such estate is ordered, the estate and interest of every such tenant or person will pass thereby; and the purchaser, his heirs and assigns, will hold such premises free and discharged from all claims by virtue of any such estate or interest, whether the same be to any undivided share of a joint tenant, or tenant in common, or to the whole or any part of the premises sold. 2 *R. S.* 325, *sec.* 51.

Upon such sale being made of any such interest or estate, the court will direct the payment of such sum in gross, out of the proceeds thereof, to the person entitled to such estate in dower, tenancy by the curtesy, or tenancy for life, as shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction for such estate or interest, and which the person so entitled shall consent to accept in lieu thereof, by an instrument under seal, duly acknowledged or proved in the manner that deeds are required to be proved, to entitle them to be recorded. *Ib.*, *sec.* 52. For annuity table, see *Appendix* to *Supreme court Rules.*

In case no such consent be given at or before the coming in of the report of sale by the commissioners, then the court is required to ascertain and determine what proportion of the proceeds of such sale, after deducting all expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate or interest in dower, by the

curtesy, or for life; and to order the same to be brought into court, for that purpose. *Ib.*, *sec.* 53.

The proportions of the proceeds of such sale, are to be ascertained and determined, in the several cases, as follows:—

1. If an estate in dower shall have been included in the order of sale, its proportion shall be one third of the proceeds of the sale of the premises, or of the sale of the undivided share in such premises, upon which such claim of dower existed.

2. If an estate by the curtesy, or other estate for life, shall be included in the order of sale, its proportion shall be the whole proceeds of the sale of the premises, or of the sale of the undivided share thereof, in which such estate shall be.

And in all cases, the proportion of the expenses of the proceedings are to be deducted from the proceeds of the sale. *Ib. sec.* 54.

If the persons entitled to any such estate in dower, by the curtesy, or for life, be unknown, the court will take order for the protection of the rights of such persons, in the same manner, as far as may be, as if they were known and had appeared. *Ib. sec.* 55; *and see ante, p.* 362.

Rights of Married Women, and others, having future interests in Property.] In proceedings for partition the inchoate right of dower of a married woman, in the undivided share of her husband in the land, where the wife is a party to the proceedings, will be divested by a sale of the premises, under the judgment of the court. 7 *Paige*, 387; 22 *Wend.* 498; 5 *Abb. Pr. R.* 100, 102; *Laws of* 1840, *p.* 128.

And so, also, the interest of those having vested or contingent future rights or estates in the land, will be divested by a sale. *Id. ibid.*

In cases of sales of land in which such inchoate right, or such future right or estate exists, it is the duty of the court under whose judgment such sale is made, to ascertain and settle the proportional value of such inchoate, contingent, or vested right or estate, according to the principles of law

applicable to annuities and survivorships, and to direct such proportion of the proceeds of the sale to be invested, secured, or paid over in such manner as shall be judged best to secure and protect the rights and interests of the parties. (*a*) *Laws of* 1840, *supra.*

Formerly, the usual practice where a release could not be obtained from the wife, of her inchoate right of dower in the premises, was, to pay the money set apart for such right, into court. But, it seems, the practice is now changed; and the money may now be paid directly to the wife. 11 *How. Pr. R.* 176, 178. Such money represents the present worth of her inchoate right in the premises, and is her absolute property. 4 *Sand. Ch. R.* 396.

But the wife may release her right or interest to her husband, and acknowledge the same before any officer authorized to take the acknowledgment of deeds to be recorded in this State, or before the referee or one of the commissioners making the sale, separate and apart from her husband in the manner required by law (1 *R. S.* 758), in respect to the acknowledgment of deeds by married women. *Laws of* 1840, *p.* 128; *Ib.* 321.

Upon the execution of such release, the share of the proceeds of the sale arising from the wife's contingent interest, shall be paid to her husband. *Laws of* 1840, *p.* 128, *sec.* 2.

The release, so executed, and also the payment, investment, or otherwise securing the share of such married woman, or of the person having such future right in the proceeds of the sale, as above directed, will be a bar both in law and equity against any such right. *Ib. sec.* 3. And the persons so barred not only include those in being in whom the estate might subsequently vest, but those not in being. 5 *Abb. Pr. R.* 92, 103.

With respect to the value of an inchoate tenancy by the curtesy, this depends not only upon the principles applicable

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(*a*) For the rule to compute the present value of an inchoate or contingent right of dower, see 7 *Paige*, 408; *M'Kean's Pr. L. Tables*, 25, § 4; *Hendry's Ann. Tables*, 87, *Prob.* 4. And of an inchoate tenancy by the curtesy, 11 *How. Pr. R.* 177, 180. And see Annuity Table in *Appendix* of *Supreme-court Rules.*

to life annuities and survivorships, but upon the fact of issue, and if none, upon the likelihood of issue. 11 *How. Pr. R.* 177, 180.

Costs of Proceedings.] When final judgment for partition is rendered, the court will direct each of the parties, except the plaintiffs, to pay to the plaintiffs, a proportion of the costs and charges of the proceedings, to be ascertained by the court, according to the respective rights of the parties, and the proportion of such costs assessed upon the unknown owners, to be chargeable on the part remaining undivided; and upon such judgment execution may issue as in personal actions, and may be levied upon the property of the parties respectively charged with such costs, and upon any share or part of the premises allotted on any such division, to any owner unknown or not named, and upon every portion remaining undivided, for the proportion adjudged to be paid by such owners, or chargeable to the part remaining undivided. And a sale of such premises thereupon shall be as valid as if such unknown owner had been named in the proceedings and in such execution. (*a*) 2 *R. S.* 328, *sec.* 72.

If an actual partition of the premises is ordered, the aggregate amount of the costs of the several parties, is to be apportioned and charged upon the parties to the proceedings, according to their respective rights and interests in the premises; and the parties whose taxed bills exceed their ratable proportions of the whole costs, are entitled to execution against those whose taxed bills are less. See 7 *Paige*, 204. (*b*)

If the plaintiffs shall become nonsuit, or suffer a discon-

(*a*) But the costs of parties unnecessarily made defendants, in an action for partition, will be directed to be paid by the plaintiff personally; and cannot be charged upon the property unless such parties were so brought into the suit at the request or consent of the other defendants. *Hammersley* v. *Hammersley*, 7 *L. O.* 127. And so, the plaintiff, where he causes litigation by setting up an unfounded claim, will be charged with the additional costs occasioned thereby. 1 *Sand. Ch. R.* 40.

(*b*) See this case, also, for form of judgment with respect to the costs of guardians ad litem of infants, where an actual partition is adjudged.

tinuance, or a verdict shall pass against them, or judgment shall be rendered against them on demurrer, they must pay costs, to be recovered and collected as in personal actions. 2 *R. S.* 329, *sec.* 73.

Where the premises are sold, the costs and expenses of the proceedings are to be deducted from the proceeds of any sale made by the commissioners; and must be by them, in the first instance, paid to the plaintiffs, or their attorney. *Ib.* 327, *sec* 62.

It is also further provided by statute that on an appeal from the order or judgment of the court, the court may direct the costs to be paid by either of the parties, or by any one or more defendant or plaintiff, to his co-defendant or co-plaintiff. *Ib.;* and see 2 *R. S.* 329, *sec.* 78. And the costs are in the discretion of the court. *Laws of* 1854, *ante, p.* 19; *Code of Pro.* § 306; 16 *How. Pr. R.* 60.

In respect to the rule by which to determine the allowance of costs, reference must be had to the Code of Procedure, the provisions of which relating to costs in civil actions, are no doubt to govern the allowance of costs in this proceeding. (*a*) See *Laws of* 1854, *p.* 592, *sec.* 3, *ante, p.* 19; *Code of Pro.* §§ 2, 3, 318, 471; 16 *New York R.* 82, per Denio, J.; 2 *Mon. Pr.* 60; 24 *Barb.* 149; 25 *Id.* 336; 13 *How. Pr. R.* 400, per Harris, J.; and see *ante, p.* 16, *note.*

In respect to the fees and expenses of commissioners and surveyors, see *ante, p.* 344.

(*a*) In civil actions, the costs are regulated by the Code of Procedure. See § 307, *&c., as amended by Laws of* 1857 *and* 1858.

In addition to the allowances provided by § 307, the plaintiff, upon the recovery of judgment in an action for partition, is entitled to the following percentage to be estimated upon the value of the property of which partition is sought, viz: For any amount not exceeding two hundred dollars, the sum of ten per cent.; for any additional amount not exceeding four hundred dollars, an additional sum of five per cent.; and for any additional amount not exceeding one thousand dollars, an additional sum of two per cent. *Ib.* §§ 308, 309. And the court may also, in its discretion, make a further allowance to any party, not exceeding five per cent. *Ib.* § 309, *as amended by Laws of* 1858, *ch.* 306.

The value of the property is to be determined by the court, or by the commissioners, in case of actual partition. *Ib.* §§ 308, 309.

Removing Proceedings into the Supreme Court.] Any proceedings for partition, commenced in the county courts, or in the court of Common Pleas of the city of New York, or in the mayors' courts of cities, may be removed into the Supreme Court by writ of *certiorari*, to be allowed by any of the justices thereof, if the same be served before any juror is sworn to try any issue joined in the proceedings, or before judgment is given that partition be made; and upon such removal, the like proceedings are to be had as if the petition had been originally presented to the Supreme Court. 2 *R. S.* 329, *sec.* 74; 2 *Bur. Pr.* 247.

Appeals.] It is provided by the Revised Statutes, that upon any final judgment rendered that partition be made, or confirming partition, or for the sale of any premises, or confirming such sale, a writ of error may be brought by any of the parties to such judgment, jointly or separately, and without the consent of any co-plaintiff or co-defendant, within the same time and under the like restrictions as in cases of personal actions. 2 *R. S.* 329, *sec.* 75. And that it shall not be necessary for a plaintiff or defendant bringing such writ of error to summon and sever any co-plaintiff or co-defendant. *Ib. sec.* 76. And, also, that error may be assigned upon such writ for any erroneous adjudication upon the rights of any of the respective defendants or respective plaintiffs, and that the court will direct the person whose interest is affected by the adjudication, to plead to such assignment of errors, and to appear in such cause as a defendant in error. *Ib. sec.* 77.

The remedy now, however, to review the judgment or order of the court, is by appeal; the practice in which is regulated substantially by the Code of Procedure. See *Code*, §§ 8, 11, 333, 323, 457, 471; 2 *R. S.* 329, *sec.* 75, *supra; Ib.* 330, *sec.* 85; *Laws of* 1854, *ante*, *p.* 19; *and see*, *also*, *ante*, *p.* 16, *note.*

The appeal is placed upon the calendar, and brought on for argument the same as in civil actions. Where the plaintiff's rights are not contested, no copies of the pleadings need be furnished to the court. *Sup. Court Rules*, 1858, *No.* 42.

But an appeal cannot be taken until after the entry of

judgment making partition; and, therefore, an appeal will not lie from an order declaring the rights of the parties, and appointing commissioners to make partition. 2 *Selden*, 465. The appeal, in such case, should be delayed until final judgment, when both the intermediate order and the judgment will be open for review. *Ib.*

The court, upon the appeal, may give judgment, either of affirmance or reversal, in whole or in part, and as to any or all the parties, with costs to be paid by either of the parties, or by any one or more defendant or plaintiff to his co-defendant or co-plaintiff. 2 *R. S.* 329, *sec.* 78; *and see Code of Pro.* § 12.

Partition and Sale of Infants' Estates.] With respect to the estates of infants, the statute provides, that whenever it shall appear satisfactorily, by due proof, or on the report of a referee, to the Supreme Court, that any infant holds real estate in joint tenancy, or in common, or in any other manner, which would authorize his being made a party to a suit in partition, and that the interest of such infant, or of any other person concerned therein, requires that partition of such estate should be made, such court may direct and authorize the general guardian of such infant to agree to a division thereof, or to a sale thereof, or of such a part of the said estate as in the opinion of the court shall be incapable of partition, or, as shall be most for the interest of the infant to be sold. 2 *R. S.* 330, *sec.* 86, *as amended by sec.* 46, *of chap.* 320, *of Laws of* 1830; *Laws of* 1847, *p.* 323, *sec.* 16; *Ib.* 344, *sec.* 77.

The object of the statute was not to authorize the guardian of an infant tenant in common to sell to his co-tenants; but only to join with them in a sale of the joint interest in the property. 2 *Paige*, 566. If a co-tenant wishes to purchase the infant's share, at its fair value, the general guardian should apply for liberty to sell, under the article of the Revised Statutes (*post, Ch.* XI.) relative to the sale and disposition of infants' estates. *Ib.*

And it seems, the court will not authorize the guardian to join in a sale, except on the report of a referee, that such sale is necessary and proper. *Ib.*

The guardian must give sufficient security for the faithful performance of his trust on such sale, and to bring the proceeds of the infant's share into court, or to invest and account for the same as the court shall direct. *Ib.;* and see *Sup. Court Rules*, 1858, Nos. 62 and 70.

The guardian is required to report to the court, on oath, the partition or sale so made by him; and if the same is approved and confirmed by the court, an order must be entered authorizing the guardian to execute conveyances of the right of the infant to such part of the estate as shall have been sold, to the purchaser thereof, or to execute releases of the right of such infant to such part of the estate as in the division falls to the shares of the other joint tenants, or tenants in common. 2 *R. S.* 331, *sec.* 87. Such deeds shall be as valid and effectual to convey the share of the infant as if the same had been executed by him after arriving at full age. *Ib. sec.* 88.

In case of a sale of any part of the estate, the infant is to be deemed a ward of the court; and such order shall be taken as the court may direct, for securing, investing, and applying the proceeds of the sale, and requiring security from the guardian for that purpose. *Ib.*

If the infant is a married woman, the court may, upon petition, appoint her husband as her guardian; and to every husband so appointed, the above provisions of the statute will apply. *Ib. sec.* 97, *added by sec.* 47 *of chap.* 320 *of Laws of* 1830.

Partition of Estates of Lunatics, &c.] Whenever it is made to appear to the Supreme Court, on the application of any committee of any idiot, lunatic, or person mentally incapable of managing his affairs, holding any real estate in joint tenancy, or in common, or in any other manner, to authorize his being made party to a suit in partition, that the interest of such idiot, lunatic, or other person as aforesaid, or of any of the parties interested in the estate, requires a partition thereof, a reference will be ordered to some suitable person, to inquire into and report upon the circumstances. 2 *R. S.* 331, *sec.* 89; *Laws of* 1847, *p.* 323, *sec.* 16; *Ib.* 344, *sec.* 77.

Upon the coming in of the report of the referee, and a hearing and examination of the matter, the court may authorize the committee to agree to a partition of such estate, and to execute releases of the right of such lunatic, idiot, or other person, as aforesaid, in and to the share of such estate falling to the other joint tenants, or tenants in common. 2 *R. S.* 331, *sec.* 90.

Such releases will be as valid and effectual to convey the share of such lunatic, idiot, or other person of unsound mind, as if the same had been executed by them respectively when of sound mind and understanding, and for a valuable consideration. *Ib. sec.* 91.

Partition when State is interested.] Where any lands or tenements shall be held by the people of this State, and by any individuals as tenants in common, proceedings for the partition thereof may be had against the people of this State, in the Supreme Court, in the same manner as against individuals, and the like orders, decrees, and judgments shall be had therein. 2 *R. S.* 331, *sec.* 92.

The petition and all other notices required to be served in other cases, must be served on the attorney general, who is required to appear in behalf of the State, and attend to its interests. *Ib. sec.* 93.

And it is the duty of the attorney general, whenever directed by the commissioners of the Land Office, to cause partition to be made of such tracts of land as are held in joint tenancy, or tenancy in common, in which the people of this State are interested; and for that purpose he is authorized to do all such acts as any joint tenant, or tenant in common, may do by law. 1 *R. S.* 207, *sec.* 65.

Provision as to Claims barred by Statute of Limitations.] The authority given by the statute to proceed for the partition of real estate, will not authorize the revival or prosecution of any claim to lands which would or might otherwise be barred by any statute of limitations, or by the acquiescence of any party having any such claim. 2 *R. S.* 332, *sec.* 94.

CHAPTER X.

PROCEEDINGS AS FOR CONTEMPTS, TO ENFORCE CIVIL REMEDIES.

The contempts provided for, by the statutory provisions here considered (2 *R. S.* 534) are those which have been treated as such, merely for the purpose of enforcing some civil remedy. *Rev. Notes*, 3 *R. S.* 2*d ed.*, 772, *and Id.* 695.

The "contempts," strictly so called, punishable by courts of record, are enumerated in *Part* 3, *chap.* 3, *and title* 2, of the Revised Statutes (2 *R. S.* 278); (*a*) and the like contempts, punishable by justices of the peace, are enumerated in *Part* 3, *chap.* 2, *and title* 4, of the same statutes. 2 *R. S.* 273.

In respect to the contempts last mentioned (the consideration of which is not included in this work), reference must be had to the provisions of the Revised Statutes, above mentioned.

I. *In what Cases a Party is in Contempt.*

1. *Statutory Provisions.*] The statute undertakes to declare the cases in which the remedy by proceedings for contempt may be adopted. It does not, however, assume to include them all, it being expressly provided by sub-division

(*a*) Applicable, also, to the Marine Court of the city of New York. *Laws of* 1852, *p.* 648, *sec.* 7. And by § 272, of the Code of Procedure, the same power is given to referees on the trial of causes before them, to preserve order, and punish all violations thereof, upon such trials, as is possessed by the court. *Voorhies' Code*, § 272, *5th ed.*

eight (*post*), that that remedy may be pursued in all cases where attachments and proceedings as for contempts, have been usually adopted and practiced in courts of record, to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party.

The statute gives to every court of record power to punish by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct by which the rights or remedies of a party in a cause or matter depending in such court may be defeated, impaired, impeded, or prejudiced, in the following cases:

1. All attorneys, counselors, solicitors, clerks, registers, sheriffs, coroners, and all other persons in any manner duly selected or appointed to perform any judicial or ministerial services, for any misbehavior in such office or trust, or for any willful neglect or violation of duty therein; for disobedience of any process of such court, or of any lawful order thereof, or of any lawful order of a judge of such court, or of any officer authorized to perform the duties of such judge;

2. Parties to suits, for putting in fictitious bail as sureties, or for any deceit, or abuse of the process or proceedings of the court;

3. Parties to suits, attorneys, counselors, solicitors, and all other persons, for the non-payment of any sum of money ordered by such court to be paid, in cases where by law execution cannot be awarded for the collection of such sum (2 *Paige*, 578; 1 *Duer*, 696); and for any other disobedience to any lawful order, decree, or process of such court;

4. All persons for assuming to be officers, attorneys, solicitors, or counselors of any court, and acting as such without authority, for rescuing any property (2 *Wend.* 262), or persons, which shall be in the custody of any officer, by virtue of process issued from such court; for unlawfully detaining any witness or party to a suit, while going to, remaining at, or returning from, the court where such suit shall be noticed for trial; and for any other unlawful interference with the process or proceedings in any action;

5. All persons summoned as witnesses, for refusing or neglecting to obey such summons, or to attend or be sworn, or answer, as such witness; (*a*)

6. Persons summoned as jurors in any court, for improperly conversing with any party to a suit to be tried at such court, or with any other person, in relation to the merits of such suit; for receiving communications from any such party, or from any other person, in relation to the merits of any such suit, without immediately disclosing the same to the court;

7. All inferior magistrates, officers, and tribunals, for disobedience of any lawful order or process of a superior court, or for proceeding in any cause or matter contrary to law, after such cause or matter has been removed from their jurisdiction; and,

8. All other cases where attachments and proceedings, as for contempts, have been usually adopted and practiced in courts of record, to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party. 2 *R. S.* 534, *sec.* 1. (*b*)

The authority conferred by the above statutory provisions, is given for the protection of the rights of parties litigating in court, as well as to enable the court to protect itself, and to preserve its own dignity.

(*a*) See the statutory provisions on the subject of compelling the attendance of witnesses, in 2 *R. S.* 400; *Ib.* 540, *secs.* 34, 35, 36. By the Code of Procedure, also (*sec.* 272, *as amended by act of* 1857), referees upon the trial of causes, have "the same power to preserve order, and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance or refusal to be sworn or testify, as is possessed by the court." And the court may also punish for such contempt before a referee. 6 *Abb. Pr. R.* 217, *note.*

(*b*) "In this section," say the Revisers, "an enumeration of the general cases has been made, as well to define as to limit a power, which, while it is absolutely necessary in many cases, is yet, perhaps, more liable to abuse, and in England has been abused more, than any other possessed by the courts. The preceding section includes all cases which a diligent examination of all the writers on the subject has discovered, and which, it is supposed, ought to be included. The cases will be found in 4 *Chitty's Blackstone*, 221; *American edition of Comyn's Dig.* 1, 719, *Attachment;* 2 *Hawk.* 142."

To authorize a person to be proceeded against under the statute, it must appear that his misconduct has tended to defeat, impair, &c., the rights or remedies of a party in a cause then depending in the court. 1 *Duer*, 512.

And when such misconduct is shown, the authority of the court is not limited to the imposition of a fine sufficient to indemnify the party aggrieved, or to an imprisonment of the accused, for the sole purpose of enforcing the payment of the fine, but it extends to the punishment of the accused, when the misconduct is, in its nature, a "criminal contempt." *Ib.*

2. *Contempts in not paying money ordered to be paid.*] The statute, as we have seen, authorizes a party to be proceeded against for a contempt, for the non-payment of any sum of money, ordered by the court to be paid, in cases where by law execution cannot be awarded for its collection. *Sec.* 1, *sub.* 3, *supra;* 2 *Paige*, 578; 1 *Duer*, 696, 698.

And it further provides, that when any rule or order of a court, shall have been made for the payment of costs, or any other sum of money, and proof, by affidavit, shall be made of the personal demand of such sum of money, and of a refusal to pay it, the court may issue a precept to commit the person so disobeying to prison, until such sum, and the costs and expenses of the proceeding, are paid. 2 *R. S.* 535, *sec.* 4; *and see* 1 *Hill*, 168.

In respect, however, to the power of the court to commit for the non-payment of costs, it is now provided by the act of 1847, that no person shall be imprisoned for the non-payment of interlocutory costs, or for contempt of court in not paying costs, except attorneys, solicitors, and counselors, and officers of court, when ordered to pay costs for misconduct as such, and witnesses when ordered to pay costs on attachment for non-attendance. *Laws of* 1847, *p.* 491.

But the act of 1847, does not apply to those cases of contempt for which a fine may be imposed upon a party for any misconduct which may be productive of an actual loss or injury to the other party. And, therefore, where the defendant was ordered to appear before a referee and make an

assignment to a receiver, and to pay the costs growing out of a previous default, and failed to do so, a fine was imposed upon him, and an attachment awarded. 2 *Barb. S. C. R.* 396.

And so, that act does not apply to costs allowed in certain cases under the Code of Procedure. Thus, when costs are adjudged against an infant plaintiff, in an action, the guardian by whom he appeared is responsible for them, and payment thereof may be enforced by attachment. *Code*, § 316. And so, in actions in which the cause of action, shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person is liable for the costs, in the same manner as if he were a party, and payment thereof may be enforced by attachment. *Ib.* § 321.

In respect to the remedy for the collection of costs for the non-payment of which a party cannot now be imprisoned, the act of 1847 further provides, that process in the nature of a *fieri facias* against personal property may be issued for the collection of such costs founded on the order of court. *Laws of* 1847, *p.* 491, *sec.* 3, *supra.*

But an execution cannot be awarded to collect costs allowed by a judge in an order made in supplementary proceedings. Such an order is not an order of the *court.* 11 *How. Pr. R.* 446. The remedy for the collection of costs made by a judge out of court, it seems, is by precept to commit the party as for a contempt. *Ib.* 450, 451.

A demand of the costs ordered on a motion, is not necessary before issuing an execution for their collection. *Laws of* 1840, *p.* 333, *sec.* 15; 6 *How. Pr. R.* 121. Nor, if the costs are not paid within the time required, is an application to the court for leave to issue an execution for their collection necessary. *Ib.* 265, 311, *note;* 3 *Abb. Pr. R.* 468; *s. c.* 13 *How. Pr. R.* 191. In cases, however, where a party may be committed for the non-payment of costs, or other sum of money, before the precept to commit the party can be issued, a personal demand of the payment of such sum is necessary; and it is not enough that such demand is made of the solicitor of the party. 9 *Paige*, 609; 2 *R. S.* 535, *sec.* 4, *supra.*

The order or precept to commit for the non-payment of money, issues directly. For forms, see *Appendix*, Nos. 264, 265. The process to appear and answer is for contempts other than those for the non-payment of a sum of money. 9 *How. Pr. R.* 97; 3 *Paige*, 43; 2 *R. S.* 535, *secs.* 3, 4, 5.

The order for the payment of money should specify the time within which the money is to be paid. 2 *Barb. Ch. Pr.* 272.

If the person demanding the money under the order of the court, is not the party to whom the order directs the money to be paid, such person should be authorized to receive the money. *Ib.;* 19 *Ves.* 117. And where, in proceedings supplementary to execution, an order was made directing the defendant to pay a sum of money in satisfaction of the judgment; it was held, that the defendant was not in contempt for not paying the money to the receiver, on demand of the latter, for the reason that the order was not to pay the money into court, or to the receiver, but in effect to pay to the plaintiff directly in satisfaction of the judgment. 9 *How. Pr. R.* 97.

It is not necessary that the sum for the non-payment of which a commitment is ordered, should be named in the order. It may be ascertained by a reference for that purpose; and the referee's report, when perfected, though made after the order, is to be regarded as a part of it. 1 *Hill*, 154. And see this case for forms of orders of reference and referee's report.

Where the defendant, in an action upon an ordinary civil contract, admits part of the plaintiff's claim to be due, the court will not, under the last clause of § 244, of the Code of Procedure, enforce the payment of it by proceeding against the defendant as for a contempt. 11 *How. Pr. R.* 360; *s.c.* 2 *Abb. Pr. R.* 129. Otherwise, however, where the money is admitted to be due in a fiduciary capacity, so that under § 179, the defendant might be arrested at any time in the action. 1 *Id.* 443. And, it seems, the practice in this respect, is the same as before the Code, and that an interlocutory order for the payment of money admitted to be due in an answer, and

which will be enforced by attachment, will in general be granted only to enforce payment of moneys received or withheld in violation of a trust, and not of an ordinary debt. *Ib.*

In the New-York Court of Common Pleas, however, it has been decided, substantially, that a party may, in all cases, be compelled, by attachment, to pay a sum of money admitted by his pleading to be due. 1 *Abb. Pr. R.* 220; *Id.* 399; *s. c.* 3 *E. D. Smith*, 607; *and see Id.* 599, 614. The question, therefore, may be regarded as unsettled, though the weight of authority is in favor of the practice above stated. (*a*)

If moneys are collected by a solicitor for his client, which he refuses to pay over, the court will enforce the payment of the money by a commitment for a contempt. 5 *Paige*, 311.

A guardian may be proceeded against in a surrogate's court, by attachment against his person, as for a contempt, where he neglects or refuses to comply with a decree made on a final accounting by which he is required to pay the balance in his hands to another guardian appointed in his stead, or to the ward, if he has attained his majority. 10 *Barb.* 524, *aff.* 1 *Kern.* 324. And so, an executor may, in like manner, be proceeded against where a decree has been made against him by the surrogate directing the payment of moneys to a legatee under the testator's will; and this, too, notwithstanding an execution may be issued for the collection of the same moneys. *Id. ibid.*; 1 *Brad.* 490; *but see contra*, 1 *Duer*, 696. An attachment, however, will not be allowed where an execution has been issued for the collection of the moneys, which has been returned unsatisfied, and the executor, on the return of an order to show cause, sets up his inability to pay,—unless it is made to appear that the debt was fraudulently contracted, or that the executor willfully retains possession of funds or assets still in his hands, or refuses to pay

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(*a*) Since the decision of the cases cited, the last clause of § 244 of the Code has been amended. *Laws of* 1857, *vol.* 2, *p.* 555. It now provides, that "When the answer of the defendant *expressly or by not denying*, admits part of the plaintiff's claim to be just, the court on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a *judgment or* provisional remedy." The amendment consists of the words in italics.

when he has the means of doing so. 1 *Brad.* 490, 493. But the executor, in such case, should be required to submit to an examination as to his property, and to consent to the application of his choses in action to the payment of the sum decreed, as conditions or terms of relief. *Ib.*

If the defendant is committed for the non-payment of costs, or other sum of money, he is entitled to the jail liberties, 4 *Paige*, 282; *Id.* 397; 2 *R. S.* 433, *sec.* 40; otherwise, however, where the party is committed for the non-payment of a fine imposed upon him by the court for the breach of an injunction, or other contempt. In such case he must be confined within the walls of the prison. *Id. ibid.;* 10 *Paige*, 606. And so, a defendant committed for the non-payment of costs or other sum of money, may be discharged from imprisonment, under the statute, upon presenting a petition and making an assignment of his property. 2 *R. S.* 31, *sec.* 1. *Laws of* 1847, *p.* 491, *sec.* 1; 3 *Paige*, 38, 43; 4 *Id.* 282. Such discharge, however, is not authorized, where the party is in execution for a fine imposed for a contempt of court, or where he is committed for the non-performance of some act or duty which it is in his power to perform. *Id. ibid.*

3. *Violation of Injunction Order.*] It is also a contempt of court to violate an order of injunction granted in a case in which the court has jurisdiction. 2 *Paige*, 326; 4 *Id.* 444; 5 *Abb. Pr. R.* 244; 1 *Duer*, 512; 5 *Seld.* 263; 3 *Sand. S. C. R.* 676; 15 *Barb.* 194; 15 *How. Pr. R.* 81.

It is the duty of a party served with an injunction, not only to refrain from taking any further active part in the proceedings enjoined, but also to direct the officers of the court and others who act in the proceeding at his instance and under his control to delay further steps in the matter pending the injunction. 5 *Abb. Pr. R.* 244; 15 *How. Pr. R.* 81. And therefore, if the party stands by and allows a process over which he has control to be executed, after he has himself been served with an injunction restraining it, he is guilty of disobedience to the order, and may be punished as for a contempt. *Id. ibid.* And so, when an injunction is

directed to a corporation, it is operative and binding, not only upon the corporation itself, but upon every person whose personal action, as a member or officer of the corporate body, it seeks to restrain or control. 1 *Duer*, 451; *Id.* 512. And every such person is as fully bound to personal obedience, as if he were personally named in the process; and is therefore just as liable for his disobedience. *Ib.; and see* 5 *Selden*, 263.

If an injunction is violated, in a proceeding against a party for the contempt the court will not look into the merits of the cause to see if the injunction was properly issued. 2 *Paige*, 326, *supra*. "While the injunction remained in force," says Chancellor Walworth, "it was the duty of the vice-chancellor to punish every breach thereof; and in no case can a defendant be permitted to disobey an injunction regularly issued, whatever may be the final decision of the court upon the merits of the cause. If there is not sufficient equity upon the face of the bill to support the injunction, the proper course for the defendant is to apply at once for a dissolution." *Ib.* 329; and see 1 *Duer*, 452. A party, therefore, will be in contempt for breach of an injunction, if the officer allowing it had jurisdiction, notwithstanding that it was erroneously granted, and for an insufficient cause. 4 *Paige*, 444, The point on this subject is correctly stated in *Wilcox* v. *Jackson* (13 *Peters*, 511), thus: "Where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void." And see also, 1 *Duer*, 451; and 5 *Selden*, 263, 266, per Johnson, J. But when the injunction which is violated has been erroneously issued, the court will take the fact into consideration in determining the extent of punishment to be imposed upon the party guilty of a breach of it. 4 *Paige*, 444, *supra*.

Nor is it any answer to the proceeding for a contempt, where the rights of the adverse party are involved, that the

violation of the injunction was committed under the advice of counsel. 4 *Paige*, 163; *Id.* 450; 7 *Id.* 364. "The fact that the defendants acted under the erroneous advice of counsel, to whom they applied for information how they could elude the justice of this court, and at the same time avoid punishment for a breach of the injunction, cannot protect them from a fine sufficient to compensate the adverse parties for the injuries they have sustained by the wrongful acts complained of; though it may furnish a ground to justify the court in refusing to inflict a further punishment upon the offenders for a violation of its order." *Id.* 367, per Walworth, Ch.; and see 3 *Sand. S. C. R.* 662. And to enable the court to regard such advice, the defendant should state the name of his counsel, the information which was laid before him, and the exact import of the advice given; and if the advice was written, the writing should be produced, or if not, it must be verified by the affidavit of the counsel who gave it. 1 *Duer*, 513. Nor is it any answer to the proceeding that the defendant believed the court had no jurisdiction to make the order; and such belief, even, furnishes a very slight, if any, excuse for his disobedience. *Id.*

In respect to the acts which will constitute a violation of an order of injunction, it has been held in a case where a party was restrained by injunction from interfering with the books and papers of a public office, that to assume the custody of the room appropriated to the office, and containing those books and papers, is a violation of the injunction, although the party does not touch the books and papers, nor allow others to do so. 5 *Abb. Pr. R.* 244. And so, where an injunction was granted against the mayor, aldermen, and commonalty of the city of New York, restraining them from granting the right to construct a certain railroad in that city,—it was held that the passing of a resolution by the common council, granting that right, on condition that the grantees should accept the terms of the resolution, was a violation of the injunction by those voting for it, whether the terms were accepted or not, the resolution itself doing all that could be done by the council to make the grant effectual,

5 *Selden*, 264; and see the case in the court below, 1 *Duer*, 452; *Ib.* 512. (*a*) And so, also, where supplementary proceedings were instituted against a defendant, and he was enjoined by an order of a justice of the court from disposing of, or in any manner interfering with, his property, and the defendant delayed the proceedings, and protracted the appointment of a receiver for a long period, and in the mean time confessed a judgment in another court to a third party, upon which an execution was issued and immediately returned, supplementary proceedings taken, a receiver appointed, and an assignment made to such receiver by the defendant under a judge's order before a receiver in the first proceeding was appointed, and the latter was thereby prevented from receiving the fund which the party in that proceeding was seeking to reach,—it appearing that the judgment was confessed for the purpose and with a view of enabling the second judgment creditor to obtain a receiver and a transfer to him of the fund, and thereby to prevent the first creditor from reaching it,—it was held to be a plain and intentional violation of the injunction. 3 *Sand. S. C. R.* 676; but see 4 *Paige*, 378. The mere confession of a judgment would not, of itself, be a violation of such an injunction; yet it will be so deemed when accompanied by other acts showing an intent to change the disposition of the debtor's property to the prejudice of the party obtaining the injunction. 3 *Sand.*, *supra.*

In respect to the manner in which an order of injunction should be served to bring a party into contempt, see *post*, *p.* 388.

4. *Breaking open Sealed Parts of Books produced for Inspection.*] It is a contempt of court, also, to break open the sealed parts of books produced for the inspection of an adverse party; so held, where the books, under the order of the court, were deposited in a master's office, with liberty to

(*a*) See the cases here cited, in respect to the liability of municipal corporations, or the several members thereof, for contempt, and the proceedings in such cases; and see also, 15 *Barb.* 194.

the adverse party to inspect and take extracts from such parts as related to certain partnership transactions, with the parts thereof not relating to the partnership transaction sealed up; and the adverse party, during the absence of the master, broke open the sealed parts, which contained the private memoranda and remarks of the party depositing the books, in relation to his private business. 2 *Paige*, 494. The chancellor, in that case, at first doubted the authority of the court to punish the improper conduct complained of; but on further examination was satisfied that the case was provided for by the 2d and 8th sub-divisions of the first section of the statute. *Supra.* "It was," he remarks, "an abuse of the proceedings of the court; it was also a case in which the rights of the adverse party were materially involved. While the course of judicial investigation frequently requires a party to produce parts of his books in which the adverse party has an interest, for the inspection of the latter, it may frequently be of great importance to the former that his accounts and transactions with other persons should not be exposed to the examination of strangers, and particularly of an enraged adversary. Where his books are subjected to inspection, it is the uniform practice of the court to permit a party to seal up those parts which do not relate to the subject of litigation. 1 *Wils. Ch. R.* 222; 1 *Cox's Ca.* 288. And it has been the practice of courts of record to protect suitors against any unwarrantable interference by the adverse party with rights of this description, by proceeding against the offender as for a contempt." *Ib.* 495.

If the adverse party has reason to believe that the parts sealed contain matters material to him, his remedy is to apply to the court for an order directing them to be opened, 1 *Barb. S. C. R.* 444; though if the books are produced before a referee, before making application to the court, the party should first apply for such order to the referee. *Ib.*

5. *Interfering with Property in possession of Receiver, Committee, &c.*] And so, it is a contempt of court to inter-

fere with property in the possession of an officer of the court; as, where property is rightfully in the hands of a receiver, it is in the custody of the court, and cannot be distrained upon for rent without permission of the court by whom the receiver was appointed; and any person who takes the property out of the possession of the receiver, without such permission, after he has notice of the character in which such possession is holden, is guilty of a contempt. 7 *Paige*, 513.

And so, after a person is declared by inquisition to be a lunatic, it is a contempt of court for a creditor, or other person who is informed of the proceedings, to sue the lunatic, or to levy an execution upon his property or other wise to interfere with it, without the permission of the court. 2 *Id.* 422; 3 *Id.* 199; 5 *Id.* 489.

6. *Contempts in other Cases.*] It is a contempt of the court, also, to bring an action in the name of another, without his privity or consent. 2 *Johns. Cas.* 291. The nominal plaintiff, in that case, being nonsuited, an attachment was allowed against the person who brought the action, for the costs. *Ib.; and see* 2 *Cowen*, 589.

And so, it is a contempt not to pay alimony directed by the court to be paid by the defendant in a suit commenced against him for a divorce. 15 *How. Pr. R.* 568; 2 *Barb. Ch. R.* 73. Though where alimony was fixed on a reference to a master, and the order of reference did not require the defendant to pay the sum which should be allowed; and no order had been made requiring the defendant to pay the sum so allowed,—it was held that the defendant was not liable for a contempt for not paying the same. *Ib.*

And so, it seems, a party may be punished as for a contempt for refusing compliance with an order of the court, made under the Code of Procedure, directing him to make discovery of books and papers in his possession. See *Code of Pro.* § 388; 1 *Kernan*, 575, 582. It would be otherwise, however, in respect to an order of discovery made under the provisions of the Revised Statutes. *Ib.;* and 4 *Wend.* 196.

If a person to whom a writ of habeas corpus is directed, make an insufficient or evasive return, he may be proceeded against as for a contempt: so held, where the return was, that the party, whose body was directed to be produced, was not in his custody; it appearing from affidavits produced, that the party was in fact in the custody of a subordinate officer, acting under the order of the person to whom the writ was directed, and that the command of the writ was intentionally eluded and disregarded. 10 *Johns. R.* 328; and see 2 *R. S.* 566, *sec.* 34. And it is a contempt, also, for a sheriff willfully to disobey the order of the court; as, where a party committed for contempt was placed in the custody of the sheriff, who permitted him to go at large in the sheriff's sitting room; it was held that this was an escape, and that the sheriff was guilty of a contempt. 10 *Paige*, 606.

And so, in a creditor's suit in the late Court of Chancery, where the master directed the defendant to deliver to the receiver the possession of his property, the defendant, unless he applied to the court to review the decision, might be compelled, by process of contempt, to comply with the master's directions. 8 *Paige*, 388. The defendant, however, in such case, was not in contempt for neglecting to deliver over to the receiver property which was claimed to be in the possession of, and to be owned by, a third person; unless the master decided that such property was owned by the defendant, and was under his control. *Ib.* 273.

A party may also be proceeded against as for a contempt who refuses to attend and testify, when required to do so by an adverse party in an action under the Code of Procedure. *Code*, § 394.

How Order to be Served to bring Party into Contempt.] It is not necessary that the order, for the violation of which the defendant is proceeded against for a contempt, should in all cases be served upon the party personally. In one case it was held to be sufficient if it is served upon the defendant's solicitor, where a knowledge of such service is brought home to him. 4 *Paige*, 405. So, if the defendant is informed of

an order for an injunction, by a person who was present in court at the time it was granted, it is sufficient. 3 *Ed. Ch. R.* 236. So, if he has personal notice of an order, by being himself in court when it is made. 2 *Barb. Ch. Pr.* 275; 2 *Jac. & W.* 264; 12 *Ves.* 202; 14 *Id.* 136.

In the case, however, of *Coddington* v. *Webb* (4 *Sand. S. C. R.* 639), the court held that for the purpose of founding a proceeding for a contempt of court, it is necessary to show the original order, with the signature of the judge, at the time of the delivery of the copy. To the same effect is the case of *Watson* v. *Fuller* (9 *How. Pr. R.* 425). In the former case, however, the injunction order was made *ex parte*; and in the latter, the parties proceeded against were not parties to the action.

The rule adopted in *Coddington* v. *Webb* was alluded to by Bosworth, J., in the case of *The People* v. *Compton and others* (1 *Duer*, 513, 553); and that justice, alluding to the manifest propriety of restricting the application of the rule there laid down, remarked: "The rule adopted in the case cited, if adhered to as a rule to be applied to all cases, would be productive of irreparable injury to parties, as will be manifest from looking into the facts of some of the reported cases, which hold that a party may be punished as for a contempt, when he has knowingly and designedly done acts which he knew, at the time, the court had, by an order, prohibited him from doing, although at the time no order had been served, or in fact entered—but had only been directed to be entered." The same learned justice also remarks, that "where a party is directed by an order of court to do something, as to pay money, deposit papers, &c., and his whole obligation to act at all depends not only on the existence of the order, but also upon its being served in a particular manner, it is a proper rule of practice not to hold him guilty of a disobedience of the order for not having done the thing required until he has been shown the order, and furnished with a copy of it." *Ib.* 554.

And so, in *The People* v. *Sturtevant* (5 *Selden*, 263, 278), the court, alluding to the practice in the late Court of Chan-

cery, remarked that that court "never lost sight of the principle that it was the disobedience to the order of the court which constituted the contempt, and, therefore, although it required of the party availing himself of its order, a substantial compliance with the rules and practice upon the subject, it would not usually allow the effect of its orders to be wholly lost, when the party sought to be bound by the order had actual knowledge or notice of its existence, although there might have occurred some slip in the formal method of bringing it home to him." And see 5 *Abb. Pr. R.* 251, per Ingraham F. J.; 1 *Craig & Phil.* 98; 4 *Myl. & C.* 498.

If the injunction order is granted by the *court*, and not by a judge out of court, it is properly served by delivering a certified copy; and no exhibition of the original order is requisite. 5 *Abb. Pr. R.* 244, *supra.*

The service of an injunction order upon a person who is not a party to the proceedings in which it was granted, and to whom the order is not directed, does not operate to bind him. Its utmost effect upon him, is as a notice. 19 *Barb.* 356.

II. *How Parties Proceeded Against.*

Courts and Officers having Jurisdiction.] The proceedings for contempts to enforce civil remedies, and to protect the rights of parties in civil actions, are confined, by the statute here considered, to courts of record. 2 *R. S.* 534, *sec.* 1. Jurisdiction, however, in such proceedings, is conferred by other statutes upon surrogates' courts, though not courts of record, to the same extent, substantially, as upon the latter courts. (*a*) 10 *Barb.* 524, *aff.* 1 *Kern.* 324; 1 *Brad.* 490; 1 *Duer*, 696.

(*a*) By the Revised Statutes (2 *R. S.* 221, *secs.* 6 *and* 9), the surrogate has power to punish witnesses for disobedience to subpœnas, or for refusing to testify; to enforce all lawful orders, process, and decrees, by attachment; and to issue process to, and exact obedience from, sheriffs, jailors, coroners, or other executive officers. And by the act of 1837 (*p.* 535, *sec.* 67), the 10th, 12th, and 13th sections, and also sections 16 to 32, of the Revised Statutes, here considered, are made to apply to attachments issued by surrogates' courts.

By the Code of Procedure, also, if any person, party or witness, disobey an order of the judge or referee duly served, in proceedings supplementary to execution, such person, party or witness may be punished by the judge, as for a contempt. (*a*) *Code*, § 302 ; 3 *Sand. S. C. R.* 676. The power to punish in such case, however, is not confined to the judge, but the court, also, may punish the disobedience. 13 *How. Pr. R.* 331 ; *s. c.* 4 *Abb. Pr. R.* 93 ; *and see* 6 *Id.* 217, *note ; Voorhies' Code*, § 302, *and notes ; but see contra*, 13 *How. Pr. R.* 174 ; *s. c.* 3 *Abb. Pr. R.* 424 ; *and see* 2 *E. D. Smith*, 503.

Who may apply.] The person applying to punish a party for a contempt must show that he has some interest in the subject-matter of the injunction or other matter pending in court, or that he has a right to prosecute for the misconduct or other injury complained of. 4 *Paige*, 163.

It is otherwise, however, in respect to infants, lunatics, &c., who are unable to protect their own rights. *Ib.*

Where, and how Application to be made.] The application to punish a party for a contempt must be made to the court in which the cause or matter prejudiced by the misconduct aileged, is depending. 2 *R. S.* 534, *sec.* 1, *supra.* Where, however, the misconduct has occurred at any circuit court, or in reference to any process or proceedings pending in or returnable to such court, and which has not been punished by such court, the Supreme Court shall have the same jurisdiction and power to inquire into and punish the same, as if such misconduct had occurred in the Supreme Court, or in reference to any process or proceedings therein. *Ib.* 539, *sec.* 33. (*b*)

(*a*) Although the Code of Procedure gives to the judge the power of punishing contempts to his orders, reference must be had to the statutory provisions here considered, as to the mode in which that power is to be exercised. 2 *Sand. S. C. R.* 724 ; *s. c.* 4 *How. Pr. R.* 369 ; *and see notes to* § 302 *of Voorhies' Code.* If the party is proceeded against by attachment, it may properly, in such case, be made returnable before the judge at his office. *Id. ibid.; and see* 2 *E. D. Smith*, 503.

(*b*) The Revisers, in their original note to this section, remark, that " ques-

And so, where the contempt charged consists in disobedience to an order made by a judge or referee in supplementary proceedings, the application should be made to the judge making the order, or appointing the referee. *Code of Pro.* § 302; *and see ante, p.* 391, *note a.* Though the court, also, may entertain jurisdiction and punish the disobedience to the judge's order. 13 *How. Pr. R.* 331; *s. c.* 4 *Abb. Pr. R.* 93; but see *contra*, 13 *How. Pr. R.* 174; *s. c.* 3 *Abb. Pr. R.* 424.

And so, where a rule shall be entered in any court requiring any officer, or other person, to whom any process of such court has been directed and delivered, to return the same, an attachment will issue for disobedience to such rule, of course, and without special application to the court. 2 *R. S.* 536, *sec.* 6; *Sup. Court Rules*, 1858, *No.* 8; *and Rules of* 1847, *No.* 13, *post.* And an attachment will also issue against a sheriff, without special application to the court, where he fails to return an attachment issued for a contempt, by the return day therein specified, and without any previous rule or order for that purpose. 2 *R. S.* 537, *sec.* 17, *post.* In such case, the application must be made to a judge of the court, or some officer authorized to perform the duties of such judge. *Ib. secs.* 11 *and* 17.

The application is founded upon affidavits, setting forth the neglect or violation of duty, or the misconduct complained of; though where the misconduct is committed in the immediate view and presence of the court, it may be punished summarily. 2 *R. S.* 535, *secs.* 2, 3.

Methods of Proceeding for Contempts.] The statute provides that when any misconduct punishable by fine and imprisonment is not committed in the immediate view and presence of the court, the court shall be satisfied by due proof,

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tions may arise, how far the circuit courts are now distinct from and independent of the Supreme Cour . To remove all room for doubt, and to provide for cases where it will be absolutely necessary such a power should be exercised by the Supreme Court, this section is prepared." 3 *R. S.*, 2*d ed.*, 774.

by affidavit, of the facts charged, and shall cause a copy of such affidavits to be served on the party accused, a reasonable time to enable him to make his defence; except in cases of disobedience to any rule or order requiring the payment of money, and of disobedience to any subpœna. 2 *R. S.* 535, *sec.* 3.

And when any rule or order of the court has been made for the payment of costs, or any other sum of money, and proof, by affidavit, has been made of the personal demand of such sum of money, and of a refusal to pay it, the court may issue a precept to commit the person so disobeying to prison until such sum, and the costs and expenses of the proceedings, are paid. *Ib. sec.* 4.

In all cases, other than that specified in the last section, the court is required either to grant an order on the accused party, to show cause, at some reasonable time to be therein specified, why he should not be punished for the alleged misconduct; or to issue an attachment to arrest such party, and to bring him before the court to answer for such misconduct. *Ib. sec.* 5.

But when a rule shall have been entered in any court, according to the practice thereof, requiring any officer, or other person, to whom any process of such court may have been directed and delivered, to return the same, an attachment for disobedience of such rule may issue, according to the practice of the court, to arrest such officer or person, to answer for such disobedience, without special application to the court. *Ib. sec.* 6; *and see Sup. Court Rules*, 1858, *No.* 8; *and Rules of* 1847, *No.* 13, *post.*

The statute thus allows two methods of proceeding against a party as for a contempt to enforce civil remedies (*i. e.* in all cases, except where the contempt is for the non-payment of money), viz: by attachment to bring the party into court to answer for the alleged contempt, or by an order for the accused to show cause why he should not be punished for his alleged misconduct. 9 *Paige*, 372; 2 *Sand. S. C. R.* 724, 728; *s. c.* 4 *How. Pr. R.* 369.

The application for an attachment may be made *ex parte*,

or on notice of motion, accompanied with copies of the papers on which the same is founded. And whether it shall issue in the first instance, or on notice, is in the discretion of the court, or officer granting it. The usual and more advisable course, however, is—except in those cases where it may be important, for the rights of the party prejudiced, that the defendant be brought into court in the first instance—to apply for the attachment on notice in the usual manner, or on an order to show cause. *Id. ibid.; and see* 1 *Hill*, 168; 10 *Johns.* 333. For forms in proceedings for attachment generally, see *Appendix*, Nos. 263 *to* 286.

In respect to attachments against a sheriff or other officer for not returning process, &c., in actions under the Code of Procedure, it is provided by rule 8 of the Supreme Court (*Rules of* 1858), that at any time after the day when it is the duty of the sheriff or other officer, to return, deliver, or file any process, undertaking, order, or other paper, by the provisions of the Code of Procedure, any party entitled to have such act done, may serve on the officer a notice to return, deliver, or file such process, undertaking, order, or other paper as the case may be, within ten days; or show cause at a special term to be designated in said notice, why an attachment should not issue against him. For form of notice, see *Appendix*, No. 266.

And in proceedings other than those relating to actions under the Code, the party interested may serve a notice upon the officer at any time before the return day of the writ, requiring him to return such writ within twenty days after service of such notice; and, if not so returned, upon filing in the office of the clerk of the county in which the writ is returnable, an affidavit of the service of such notice, and of the delivery of the writ, the officer's default may be entered, and an attachment issued of course. *See Sup. Court Rules*, 1847, *No.* 13. Where, however, the attachment is issued against an officer for neglect to return an attachment issued in proceedings for contempts, such attachment issues, of course, without any previous rule or order for that purpose, upon being allowed by a judge of the court, or by some officer au-

thorized to perform the duties of such judge. 2 *R. S.* 537, *sec.* 17.

1. *Proceedings by attachment.*] In proceeding by attachment the party complaining of the alleged misconduct must produce proof, by affidavit, or other legal evidence, showing that the party is in contempt. *Sec.* 3, *supra.* For form of affidavit, see *Appendix*, No. 271. Copies of the affidavit and other papers on which the application is founded, must be served upon the party accused, a reasonable time to enable him to make his defence; except where the party is proceeded against for disobedience to any order requiring the payment of money, and for disobedience to any subpœna. *Ib.* It is sufficient if copies of the papers are served simultaneously with the attachment. 2 *Sand. S. C. R.* 728; *s. c.* 4 *How Pr. R.* 369.

The affidavits on which the attachment is founded, as well as the attachment and subsequent proceedings, where the attachment is issued against the parties to the writ, are properly entitled in the original cause. 4 *Paige*, 360; 7 *Id.* 325; 1 *Barb. S. C. R.* 227. Though where the proceeding is against persons who are not parties to the suit, the affidavit and papers previous to and including the order for the attachment, should be entitled in the original cause, and all the subsequent proceedings should be in the name of the people, on the relation of the party prosecuting the attachment. 4 *Paige, supra;* 5 *Johns.* 235; 9 *Id.* 160. Thus, "The People of the State of New York *ex rel.* A. B. (the plaintiff) against C. D., sheriff of the county of Washington." *Id. ibid.;* 1 *Bur. Pr.* 359.

Where both parties are heard on the application for an attachment, if the affidavits in relation to the alleged contempt are conflicting, an attachment will properly issue to bring the defendant into court, so that he may be examined on interrogatories as to the contempt, and to enable the plaintiff to compel the attendance of witnesses to prove the facts. 4 *Paige*, 378.

It is no answer to the application for an attachment against the defendant, that the order for the disobedience of which he is sought to be punished, was improperly issued, where

such order was obtained on a motion which the defendant neglected to oppose. 3 *Paige*, 253; *and see* 2 *Id.* 326; 4 *Id.* 444.

The order for the attachment should not contain an adjudication of the court that the defendant is guilty of the contempt; but it should merely direct the issuing of the attachment, or declare only, that it appears to the court that there is probable cause for the issuing of an attachment, to bring the defendant before the court to answer as to the alleged contempt. *Ib.*

At the time of issuing the attachment, the court must direct the penalty in which the defendant must give bond for his appearance to answer. 2 *R. S.* 536, *sec.* 10. And the clerk should indorse upon the attachment a certificate to the effect that the same is issued by the special order of the court. *Ib. sec.* 14.

The attachment should be directed to the sheriff of the county; though where the sheriff is the party proceeded against, or is otherwise interested in the proceeding, it should be directed to the coroner. It should be made returnable at a special term; and is tested, signed, and sealed like ordinary process. See 15 *How. Pr. R.* 494; *Sup. Court Rules*, 1858, No. 40.

2. *Order to show Cause.*] The application for an order that the party show cause why he should not be proceeded against for a contempt, is, like the application for an attachment, founded upon affidavit showing the misconduct alleged. *Sec.* 3, *supra.* It is brought on like other motions founded on orders to show cause. The order to show cause, with copies of the affidavit and other papers on which it is founded must be served upon the party accused, a reasonable time before the hearing; and the time for the hearing must be specified in the order. *Sec.* 5, *supra.* For form of order, see *Appendix*, No. 272.

The order should be served upon the party personally; unless personal service is dispensed with, on special grounds. 2 *Barb. Ch. Pr.* 278; *and see ante, p.* 388.

If the defendant does not appear at the day appointed, or

at such other day as may be afterwards designated for that purpose, or if he appears and does not deny the alleged misconduct, the court may at once proceed to make a final decision, that the accused has been guilty of the contempt charged, and to award the proper punishment, as directed by the statute. If the alleged misconduct is denied, the court may discharge the order to show cause; or may allow interrogatories to be filed, and direct a reference to take the answers of the defendant to such interrogatories, and to take such proof as either party may wish to offer, and report the same to the court. But the proofs themselves should be reported to the court, and not merely the referee's opinion thereon; and the court is to determine, upon the original affidavits, the answers of the defendant, and such subsequent proofs, whether the accused has been guilty of the alleged misconduct. 9 *Paige*, 375, per Walworth, Ch.; *and see* 4 *Id.* 378; 2 *Sand. S. C. R.* 724; *s. c.* 4 *How. Pr. R.* 369.

Habeas Corpus may Issue where Party is in Custody.] If the party charged with misconduct, is in the custody of any officer, by virtue of an execution against his body, or by virtue of any process for other contempts or misconduct, the court is authorized to award a writ of habeas corpus, to bring up the body of such person, to answer for such misconduct. 2 *R. S.* 536, *sec.* 7; 22 *Wend.* 635.

In cases where a party is entitled to an attachment against any person, without the special order of the court, and such person shall be in custody, as specified in the last section, a writ of habeas corpus, to bring up such person, may be allowed by any judge of the court, or by any officer authorized to perform the duties of such judge in vacation. 2 *R. S.* 536, *sec.* 8.

Such writ shall authorize the sheriff in whose custody such person shall be, to remove and bring him before the court to which the same is returnable, and to detain him at the place where such court shall be sitting, until some order be made by the court for his disposition. *Ib. sec.* 9.

Bail; Penalty of Bond.] When the attachment is issued

by the special order of the court, under the statute, the court must direct the penalty in which the defendant must give bond for his appearance to answer. 2 *R. S.* 536, *sec.* 10.

In all other cases, when a party shall be entitled to an attachment, without the special order of the court, he shall make application to a judge of the court, or to some officer authorized to perform the duties of such judge, who, upon due proof of the facts and circumstances, shall direct the penalty in which the defendant shall give bond for his appearance, to answer to the matters alleged against him; and shall endorse such order on the attachment. *Ib. sec.* 11. And if, in such case, the order specifying the sum in which the defendant is to be held to bail, is not endorsed upon the attachment, the defendant may be discharged from arrest on executing a bond in the penalty of one hundred dollars with sureties, as prescribed by the statute. *Ib. sec.* 15, *post;* 21 *Wend.* 57.

Arrest of Defendant, and Duty of Sheriff.] Upon arresting the defendant upon an attachment, to answer for any alleged misconduct, the sheriff is required to keep such defendant in his actual custody, and to bring him personally before the court issuing the attachment; and to keep and detain him in his custody, until the court shall make some order in the premises; unless such defendant entitles himself to be discharged by giving the bond prescribed by the statute. 2 *R. S.* 536, *sec.* 12; 1 *Hill*, 154.

But when the court has once acquired jurisdiction, by arrest, under an attachment for contempt, it continues while the case is under consideration, whether the defendant remains in actual custody, or not. *Ib.*

The inability of the defendant, from sickness, or otherwise, to attend the court, personally, will be a sufficient excuse for not bringing him before the court. Nor will the officer be required in any case, to confine any person arrested upon an attachment to answer for misconduct, in any prison, or otherwise to restrain him of personal liberty, except so far as shall be necessary to secure his personal attendance. 2 *R. S.* 540, *sec.* 37.

When Defendant to be Discharged on giving Bond, &c.] In cases where a sum shall have been endorsed on any attachment issued by the special order of the court, and where any sum shall have been so endorsed by any judge or other officer as prescribed by the statute, the defendant shall be discharged from arrest on such attachment, upon executing and delivering to the officer making the same, at any time before the return day in such writ, a bond, with two sufficient sureties, in the penalty endorsed on such attachment, to such officer, by his name of office, and his assigns, with a condition that the defendant will appear on the return of such attachment, and abide the order and judgment of the court thereupon. 2 *R. S.* 537, *sec.* 13. For form, see *Appendix*, No. 276.

But when an attachment is issued without the special order of the court, and an order specifying the sum in which the defendant is to be held to bail is not endorsed thereon, the defendant shall be discharged from the arrest thereon, on executing a bond in the penalty of one hundred dollars, with sureties, in the same manner and with the like condition as above required. *Ib. sec.* 15.

And where the attachment was issued against an officer, without the special order of the court, and without any order fixing the amount of the bond, and the officer gave a bond to be discharged from arrest, with a penalty exceeding one hundred dollars,—it was held that the bond was void. The penalty, in such case, cannot legally exceed one hundred dollars. 21 *Wend.* 57.

Upon returning any attachment, the officer executing the same must return the bond, if any, taken by him, of the defendant, which must be filed with the attachment. 2 *R. S.* 537, *sec.* 16.

When Defendant cannot be Discharged, except by Court.] In cases where the attachment is issued by the special order of the court, and no sum is specified in which the defendant shall be held to bail, he shall not be entitled to be discharged from the arrest on the attachment upon executing any bond, or in any other manner, unless upon the special order of the court issuing the attachment. 2 *R. S.* 537, *sec.* 14.

And so, when a sheriff, or other officer, is proceeded against for not returning an attachment, as required by the statute, and such officer is arrested, he is not to be discharged upon bail, or in any manner, except by the order of the court. *Ib. secs.* 17, 18, *post.*

Sheriff's Return, and Attachment for Default.] The sheriff or officer to whom the attachment is delivered, is required by the statute to return the same by the return-day specified therein, without any previous rule or order for that purpose; and in case of default, an attachment may be issued against him, of course, upon being allowed by a judge of the court, or by some officer authorized to perform the duties of such judge, upon proof of such default. 2 *R. S.* 537, *sec.* 17. And the court, in term time, may also allow such attachment. 23 *Wend.* 102.

The court, or judge, in the allowance of the attachment, must state the cause of issuing the same, and that the defendant is not to be discharged upon bail, or in any other manner, but by order of the court. 2 *R. S.* 537, *sec.* 17.

The officer to whom the last-mentioned attachment is delivered, is required to execute the same by arresting and keeping the defendant in his custody, bringing him personally before the court, and detaining him in his custody until the order of the court. *Ib. sec.* 18.

The officer who serves the attachment must return the same to the court, at the place where the court is held, on the return-day of the attachment, and during the actual sitting of the court on that day. 7 *Paige*, 435; and see 3 *Id.* 85. For form of sheriff's return, see *Appendix*, No. 272. But he has the whole time of the actual sitting of the court upon the return-day to return the same, unless he is specially directed by the court to return it immediately. And where the party prosecuting the attachment wishes to expedite the proceedings, he may, upon an affidavit of the delivery of the process to the proper officer a sufficient time before the return day to have enabled him to serve and return it, and that it has not been returned, move the court, previous to its adjournment on the return day, for an order that such officer return

the attachment during the sitting of the court on that day, or that an attachment issue against him, upon filing the clerk's certificate of his default. But it is irregular to take out an attachment against the officer during the actual sitting of the court on that day. 7 *Paige, supra.*

If the attachment which is returnable on a particular day, is not received by the sheriff in time to serve it and to bring the defendant before the court at the place required, he should not arrest the defendant, but should return the attachment *tarde.* 4 *Id.* 360.

Proceedings in case of Defendant's Default.] If the attachment which has been issued against a defendant is returned served, and the defendant does not appear on the return day thereof, the court may either award another attachment, or may order the bond, taken on the arrest to be prosecuted, or both. 2 *R. S.* 539, *sec.* 27. For form of order that attachment issue, see *Appendix*, No. 277. If the bond is ordered to be prosecuted the order should also specify the name of the aggrieved party, and should authorize him to prosecute the same. *Ib. sec.* 28; *and see* 21 *Wend.* 57. For form, see *Appendix*, No. 278. But if there is no party aggrieved by the misconduct of the defendant, the order should direct it to be prosecuted by the attorney general, or by the district attorney of the county in which the bond was taken, in the name of the officer who took the same. 2 *R. S.* 539, *sec.* 30.

If a bond has been given, and the attachment is returnable before the Supreme Court, at special term, it is not absolutely necessary that the defendant should be called on the first, or return day, especially if the attachment is not filed on that day. An appearance on the second day is sufficient for him, as well as for the relator. 15 *How. Pr. R.* 494. Formerly, the defendant was required at least to appear on the second non-enumerated day in term, *Ib.;* 3 *Wend.* 423; and the court requires nothing more than that now, by requiring him to appear on the second day in a special term. 15 *How. Pr. R., supra.*

Action by Party Aggrieved upon the Defendant's Bond.] If the court orders the bond taken on the defendant's arrest to be prosecuted, and authorizes the party aggrieved to prosecute the same, such order operates as an assignment of the bond, and such party may maintain an action thereon in his own name, as assignee of the sheriff or officer to whom the same was given, in the same manner as in other actions on bonds, with condition to perform covenants other than for the payment of money. 2 *R. S.* 539, *secs.* 27, 28.

The action upon the bond is to be conducted in conformity to the Code of Procedure. *Code*, § 471.

In respect to the complaint in the action, it should set forth, substantially, the same facts as the old declaration. Thus, it should aver that the party bringing the action is the party aggrieved; and it should show his connection with, and relation to, the attachment proceedings, and how and to what extent he has been aggrieved by the acts of the defendant. 7 *Barb.* 581; *s. c.* 3 *Code R.* 230. And it should also show that the bond has been ordered by the court to be prosecuted, and that the plaintiff in the action has been authorized by the court to prosecute the same. *Id. ibid.;* 21 *Wend.* 57, 58.

But it is not necessary to allege in the complaint the misconduct for which the attachment issued; nor to specify the manner in which the plaintiff is connected with the proceeding: it is sufficient if it is alleged that he is the party aggrieved. *See* 17 *Wend.* 59; 7 *Barb.* 584, *supra.* Nor is it necessary to aver that the attachment on which the defendant was arrested, has been returned; nor that the defendant was called on the return day and his default entered. *Id. ibid.* Nor, where the process on which the defendant was arrested, is a *pluries*, is it necessary to set forth the attachment and *alias*. *Id. ibid.* And so, where an action is brought upon a bond given for the appearance of the defendant under attachment in proceedings supplementary to execution, it is not necessary to set forth in the complaint the issuing or return of an execution unsatisfied; nor that an order was made for the attachment. 2 *E. D. Smith*, 503.

The measure of damages to be assessed in the action, shall

be the extent of the loss or injury sustained by such aggrieved party, by reason of the misconduct for which the attachment was issued, and his costs and expenses in prosecuting such attachment. 2 *R. S.* 539, *sec.* 29. And the court may allow reasonable counsel fees to the aggrieved party, as forming a part of the expenses to which he is justly entitled. 4 *Duer*, 148. But if the "costs and expenses" of the relator included in a fine imposed by the court, are paid to the aggrieved party, his acceptance of the payment is a bar to a recovery of such costs and expenses, in an action on the bond given for the defendant's appearance. *Ib.*

Action upon Bond, where there is no Party Aggrieved.] If there is no party aggrieved by the misconduct for which the attachment was issued, the court, in case the defendant shall fail to appear according to the condition of the bond taken on the arrest, shall order the same to be prosecuted by the attorney general, or by the district attorney of the county in which the bond was taken, in the name of the officer who took such bond. 2 *R. S.* 539, *sec.* 30.

In such case, the whole penalty of the bond shall be forfeited and recovered, and from the moneys collected thereon, the court shall order such sum to be paid to the party prosecuting the attachment, as the court ordering the prosecution shall think proper, to satisfy the costs and expenses incurred by him, and to compensate him for any injury he may have sustained by the misconduct for which such attachment was issued; and the residue of such moneys shall be paid into the treasury of this State. *Ib. sec.* 31.

Liability of Officer, if insufficient Sureties are taken.] If on the return of executions duly issued upon any judgment obtained on the bond taken on the arrest of the defendant, it shall appear that the sureties taken therein were, at the time of taking them, insufficient, and that the officer receiving them had reasonable grounds to doubt their sufficiency, he shall be liable in an action on the case, to the party aggrieved, who may have prosecuted such suit, for the

amount of the judgment recovered by him, and for his costs and expenses in such suit. 2 *R. S.* 539, *sec.* 32.

If such suit was brought by the attorney general, or a district attorney, an action on the case may in like manner be brought by them, in the name of the people of this State, for the amount of the judgment so recovered; and from the moneys collected in such action the court shall order such sum to be paid to the party prosecuting the attachment, as the court ordering the prosecution shall think proper, to satisfy the costs and expenses incurred by him, and to compensate him for any injury he may have sustained by the misconduct for which the attachment was issued; and the residue of such moneys shall be paid into the treasury of the State. *Ib.*

Proceedings on Return of Attachment.] When the defendant is arrested upon the attachment, and brought into court, or has appeared therein, the court will cause interrogatories to be filed, specifying the facts and circumstances alleged against the defendant, and requiring his answer thereto; to which the defendant shall make written answers on oath, within such reasonable time as the court may allow. And the court may receive any affidavits or other proofs, contradictory of the answers of the defendant, or in confirmation thereof; and upon the original affidavits, such answers and such subsequent proof, shall determine whether the defendant has been guilty of the misconduct alleged. 2 *R. S.* 537, *sec.* 19. (*a*)

(*a*) The following is the Revisers' original note to this section: "By the existing law, if a defendant brought up on attachment, purges himself by setting up new matter or otherwise, no contradictory evidence can be received, and he must be discharged. True, the remedy is, by indictment for perjury; but this affords no relief to the party, and his civil remedy is thus merged in the public offense. This doctrine of merger is, in all other cases, abolished, in this State, and no reason whatever is perceived for retaining it in this case. But on the contrary, as the proceeding treated of in this article is wholly to enforce civil remedies, it would seem that the object and design would be entirely frustrated by stopping short, on the defendant's denial, or showing some new matter

It seems to be necessary, under the statute, where the party is brought into court, on attachment, that interrogatories should be filed, as above required, unless the defendant admits the alleged contempt. 4 *Paige*, 378; 2 *Sand. S. C. R.* 728; 5 *Duer*, 630.

The interrogatories, under the former practice, were required to be filed within four days after the return of the attachment; and the defendant either remained in custody or put in bail, or his recognizance was taken to appear from day to day, until the court determined the case, 1 *Johns. Cas.* 31; 3 *Cowen*, 341; and if the interrogatories were not exhibited within that time the defendant might move to be discharged out of custody, or if he was out on bail, for the discharge of his recognizance. 2 *Wend.* 617. The party prosecuting the attachment might, however, exhibit his interrogatories at any time before the motion was actually made. 2 *Hawk. c.* 22, *sec.* 1; 1 *Graham's Pr.* 2*d ed.* 696. The same practice, no doubt, still prevails in the Supreme Court, except that now, when the attachment is returnable at a special term, the interrogatories must be filed within two days from the return of the attachment. *See* 15 *How. Pr. R.* 494.

A copy of the interrogatories should be served upon the defendant. 2 *Paige*, 103. In the case cited the court directed an order requiring the prosecutor to file interrogatories in relation to the alleged contempt, and to serve a copy thereof upon the defendant; and that the defendant put in written answers thereto, upon oath, and file the same within twenty-four hours thereafter.

After the interrogatories are filed, if the defendant refuses to make written answers thereto on oath within the time directed by the court, he may be re-committed; or if out on bail, and he fails to attend to be examined, the court may either award another attachment, or may order the bond taken on

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which the adverse party may have the means of disproving. The practice of examining on oath is borrowed from chancery, 4 *Black.* 223; but in that court, evidence is, and ever was received, to contradict the defendant." 3 *R. S.* 2*d ed.* 773.

the arrest to be prosecuted, or both. 2 *R. S.* 537, *sec.* 13; *Id.* 539, *sec.* 27; 1 *Dall.* 319.

The interrogatories must be confined to the subject-matter of the misconduct alleged, and not to any previous or other proceeding. 1 *Barb. S. C. R.* 228; *and see* 9 *Paige*, 376. And if the interrogatories are improper, the defendant may except or demur to them. 12 *Mod.* 499; *Str.* 444; 1 *Barb. supra.* Thus, he may demur, where the interrogatories relate to other alleged contempts than that for which he is arrested. *Ib.*

If the interrogatories are defective, they may be amended, where an amendment is necessary for the purpose of explaining an ambiguity, or obtaining a full answer to matters already stated. 1 *Johns. Cas.* 31; 6 *Cowen*, 41. Thus, in a case where a sheriff, brought up on an attachment for not returning a *fi. fa.*, in answer to the interrogatories filed, said, that the *fi. fa.* had been received by his under-sheriff; and that the money had been collected; and that he had not returned the execution; but did not say whether he had received notice of a rule to make the return,—the court allowed an amendment inserting an additional interrogatory, it appearing that the attorney for the plaintiff had inadvertently omitted an interrogatory to that point. *Ib.* An amendment, however, it seems, will not be allowed for the purpose of introducing any new matter. 1 *Johns. Cas.* 31, *supra.*

All the interrogatories, material to show the misconduct alleged, must be answered by the defendant. And so, also, interrogatories which are designed to show, by the answers of the accused, the true nature and character of the misconduct, must be answered. 1 *Duer*, 512. Thus, whether the accused had voted for certain resolutions, the passage of which was relied on as evidence to show that his disobedience to an injunction was intentional and willful. *Ib.*

The party must file his interrogatories, and obtain answers thereto, before the court can make a final order; unless the accused, upon being brought into court, upon the attachment, admits the contempt, as charged. 9 *Paige*, 372.

Upon the interrogatories being filed and answered, the court proceeds in a summary manner to decide whether the defendant has been guilty of the misconduct alleged. And in determining that question, the court, as we have seen, may receive and take into consideration, the original affidavits, and also, any other affidavits or other proofs contradictory of the answers of the defendant, or in confirmation thereof. 2 *R. S.* 537, *sec.* 19, *supra.*

Where the defendant is proceeded against by an order to show cause, if he appears and denies the contempt, the subsequent proceedings are the same, substantially, as upon the return of an attachment against him. 4 *Paige*, 378. But it is not essential to the validity of any final order that may be made, that interrogatories should be filed and answered. 5 *Duer*, 629. And, it seems, it is sufficient, in general, if the course pursued conforms to the practice of the court upon any order to show cause why relief should not be granted. *Ib.*

Reference to Examine Party and report as to Contempt.] The court may, in its discretion, order a reference to some suitable and proper person, to take the answer of the defendant to the interrogatories, and to take and report such other evidence as either party may wish to produce before him, in respect to the alleged contempt. 7 *Paige*, 372; *Id.* 603; 2 *Barb. Ch. Pr.* 277, *and note;* 3 *Sand. S. C. R.* 677; 5 *Duer*, 629; 8 *How. Pr. R.* 61, 65; *Laws of* 1847, *p.* 344, *sec.* 77.

Upon the hearing of the matter before the referee, he is not authorized to receive the ex-parte affidavits of witnesses; unless the court, by the order of reference, specially directs him to receive such affidavits as proof. And the court will not, as a general rule, allow ex-parte affidavits to be used on such reference; but will compel the parties to produce and examine the witnesses before the referee, so that they may be cross-examined by the adverse party. 7 *Paige*, 603.

If the answers of the defendant to the interrogatories are short and evasive, they may be excepted to; and if they

appear to be insufficient, the court will order them to be sent back to the referee, that they may be fully answered. 2 *Barb. Ch. Pr.* 277.

After the answers of the defendant, and the other proofs have been taken, the referee must report the same to the court; and it is not enough that he reports merely his opinion upon such proofs. 7 *Paige*, 372.

Proceedings if Defendant is found Guilty.] It is provided by the statute, that if the court shall adjudge the defendant to have been guilty of the misconduct alleged, and that such misconduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of any party, in a cause or matter depending in such court, it shall proceed to impose a fine, or to imprison him, or both, as the nature of the case shall require. 2 *R. S.* 538, *sec.* 20, *as amended by Laws of* 1843, *chap.* 9.

If the relator has sustained an actual loss, the amount of it may be ascertained by a reference for that purpose. It would be improper, however, to comprise the inquiry in respect to the damages sustained, with that in relation to the misconduct charged. 1 *Hoff. Pr.* 441; 2 *Barb. Ch. Pr.* 279.

Punishment of Defendant, and Extent thereof.] The statute provides, that if an actual loss or injury shall have been produced to any party, by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him, on the order of the court. 2 *R. S.* 538, *sec.* 21. In all other cases the fine shall not exceed two hundred and fifty dollars, over and above the costs and expenses of the proceedings. *Ib.*, *sec.* 22.

When the misconduct complained of, consists in the omission to perform some act or duty, which it is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceedings. *Ib. sec.* 23.

In all other cases, where no special provision is otherwise made by law, if imprisonment be ordered, it shall be for some reasonable time not exceeding six months, and until the expenses of the proceeding are paid; and also if a fine be imposed, until such fine be paid; and in the order and process of commitment, the duration of such imprisonment shall be expressed. *Ib.*, *sec.* 25.

If the misconduct consists in the refusal to pay costs, or any other sum of money ordered to be paid by the court, the party is to be imprisoned until such sum and the costs and expenses of the proceedings are paid. *Ib.* 535, *sec.* 4.

In respect to the punishment to be inflicted for misconduct which has been productive of an actual injury to the relator, the court has no discretion, but must impose a fine sufficient to indemnify the party for the injury, and for his costs and expenses. 7 *Paige*, 364; 2 *Id.* 326; 1 *Duer*, 513. Thus, where the defendants were proceeded against for the violation of an injunction requiring them to deliver over their property to the receiver in a creditor's suit, and the defendants, in violation of the injunction, procured the same to be delivered to the sheriff for the benefit of other creditors, the defendants were fined a sum equal to the value of the property delivered to the sheriff, and the costs of the proceedings upon the attachment. 7 *Paige*, *supra*. And so, in supplementary proceedings, where it appeared that the fund diverted by the defendant's violation of the injunction was sufficient to pay the plaintiff's debt and costs, the defendant was fined a sum equal to the amount of the judgment with interest, and the plaintiff's costs of the supplementary proceedings, and of the application to punish the contempt; and the defendant was committed until the fine was paid. 3 *Sand. S. C. R.* 676; and see 10 *Paige*, 607; 2 *Denio*, 570; 1 *Kernan*, 62.

But the actual losses intended by the statute, are those which are pecuniary in their nature, and capable of being estimated as such, with reasonable certainty; and where there is no evidence that an actual loss has been sustained, the relator is entitled only to his costs and expenses. 1 *Duer*, 512; and see 4 *Paige*, 164; *Id.* 456.

Under the authority to inflict a fine sufficient to indemnify the party aggrieved, and to satisfy his costs and expenses, the court may allow reasonable counsel-fees to such party. Such fees form a part of the expenses to which the party prosecuting the attachment is justly entitled. 4 *Duer*, 148.

If no actual loss has been produced to the relator, the next and necessary inquiry is in respect to the nature of the misconduct alleged,—in other words, was it the result of pardonable ignorance or inadvertence, or was it willful and intentional? 1 *Duer*, 512, *supra*. After reviewing the authorities bearing upon the question of the punishment to be inflicted for disobedience of an order of the court, Mr. Justice Bosworth, in the case cited, alluding to those authorities, remarks, "They seem to show a uniform understanding of the statute, that the disobedience of an order may not have been willful; that it may have arisen from an honest misapprehension by the offending party of the nature of the act which he did; and may have occurred in good faith, and in the belief that it was not disobedience. That in such a case, if actual loss results from the disobedience, the court has no discretion which will absolve it from imposing a fine which will indemnify the injured party for the loss. That in such a case, no fine should be imposed or imprisonment ordered, purely and solely as a punishment, beyond the punishment that may result from the imposition of a fine sufficient to indemnify against the actual loss, and to satisfy the expenses of the proceedings. That the disobedience may also have been willful and designedly contemptuous; and in such case, the contempt is criminal, and may be punished according to the aggravation of the case." *Ib.* 526. And it was held, therefore, in that case, that where the misconduct is shown to be willful, the court has the power, and is bound, to punish it as a "criminal contempt." And in such case, although no actual loss to the relator is shown, the court may impose a fine not exceeding two hundred and fifty dollars, and imprison the accused for a term not exceeding six months, for no other purpose than that of punishment. *Ib.*

The court cannot control the effect of a commitment; as, by directing the defendant to be denied the jail liberties, where he is entitled to them by law. So held, where the relator moved for an attachment against an attorney for the non payment of costs, and that the jail liberties be denied to him until the costs were paid. 2 *Cowen*, 589. The costs in that case, being the costs of an action which the attorney had commenced without being retained for that purpose, the commitment was in the usual form; but the court made an order that the attorney pay the costs within ten days after notice of the rule, or be suspended from all practice as an attorney until the costs were paid. *Ib.* A similar order was also made in a case where a solicitor collected money for his client which he refused to pay over. 5 *Paige*, 311.

The payment, and acceptance by the relator, of a fine imposed for an actual loss or injury produced to him, is made, by the statute, an absolute bar to any action by him to recover damages for such injury or loss. 2 *R. S.* 538, *sec.* 21; 4 *Duer*, 148.

To what Extent the Defendant's Misconduct may be excused.] In determining the punishment to be inflicted upon a party, a statement, in general terms, that the party acted under the advice of counsel, will not be accepted by the court in excuse or palliation of the defendant's misconduct. To enable the court to regard such advice, the defendant should state the name of his counsel, the information which was laid before him, and the exact import of the advice given, and if the advice was written, the writing should be produced, or if not, it should be verified by the affidavit of the counsel who gave it. 1 *Duer*, 513. Such advice, however, will not be regarded at all, so far as the rights of the relator are concerned. 4 *Paige*, 163; *Id.* 450; 7 *Id.* 364; *and see* 3 *Sand. S. C. R.* 662.

Nor is it any answer to the violation of an injunction order that the defendant believed the court had no jurisdiction to make the order; and such belief, even, furnishes a very slight, if any, excuse for his disobedience. 1 *Duer*,

513, *supra*. Nor, that it was erroneously and improperly allowed, 4 *Paige*, 444; *and see Id.* 326; 3 *Id.* 253; though the court in determining the extent of the punishment to be inflicted, in such case, will take into consideration the fact that the injunction was improperly granted, and was without sufficient equity to sustain it. *Id. ibid.*

Nor is it any answer or defence to the violation of an injunction issued upon a judgment creditor's bill, that the defendant was afterwards discharged from his debts under the bankrupt law; so held, where the defendant had rendered himself liable to a conviction for a criminal contempt, for the violation of the injunction, and after his discharge under the bankrupt act, was prosecuted for the contempt. 2 *Denio*, 570; *and see* 10 *Paige*, 284. Nor is it any defence to the attachment that the injunction was violated under the direction of a third party, who, since the service of the injunction, has become entitled to do the act complained of. 4 *How. Pr. R.* 225.

Order and Process of Commitment.] The statute provides that when the misconduct of which the defendant is convicted, consists in the omission to perform some act or duty which it is yet in his power to perform, the order and process of commitment must specify the act or duty to be performed, and the amount of the fine and expenses to be paid. 2 *R. S.* 538, *secs.* 23, 24. In all other cases, if imprisonment is ordered, the order and process of commitment must express the duration of such imprisonment. *Ib. sec.* 25.

The defendant may be committed either by a rule or order of commitment, or by process, at the election of the relator. 1 *Hill*, 154. The term "process," above mentioned, includes a rule or order of commitment. *Ib.*

The rule for commitment should show the cause of commitment. It is enough, however, that the cause be substantially stated and without technical precision. *Ib.* And where the rule mentioned a previous order to pay money, which the defendant had not complied with; it was held that the rule sufficiently showed that the cause of commitment was for a contempt. *Ib.*

Nor is it necessary that the sum for the non-payment of which a commitment is ordered, should be named in the order; but it may be ascertained by a reference, and the referee's report, when perfected, though made after the order, is to be regarded as a part of it. *Ib.* For form of commitment for the non-payment of money, see *Appendix*, No. 265.

And so the process of commitment need not recite all the facts and proceedings necessary to confer jurisdiction; but it is sufficient, if, upon its face, it appears that the court had jurisdiction, states in substance the cause of commitment, and specifies the act or duty to be performed, and the expenses to be paid. So held, where an order was made in a surrogate's court, directing a guardian to pay moneys in his possession to another guardian appointed in his place, and the guardian neglected to make such payment; and was thereupon proceeded against as for a contempt. 1 *Kernan*, 324; 10 *Barb.* 524.

In a case where an attachment was issued against the defendants for interfering with personal property in the possession of a receiver, it was held by Chancellor Walworth, before whom the proceedings were brought, by appeal, that the order of commitment, in cases of that description, should recite the substance of the alleged misconduct, the adjudication of the court that the defendants were guilty thereof, and that such misconduct was calculated to and did impair, defeat, impede, and prejudice the rights or the remedies of the prosecutor, or the parties to the action; and should direct the payment of a fine sufficient to indemnify the party injured, and to satisfy the costs and expenses of the proceeding. And that if anything remains to be done by the defendants, the order should also specify particularly what they are to do, and the manner in which it is to be done, to entitle them to be discharged upon the payment of the fine imposed. 9 *Paige*, 372; *and see* 2 *Id.* 103.

The order of commitment should also direct to whom the fine is to be paid, or what is to be done with the money when paid. *Id. ibid.*; *and see* 2 *Denio*, 570.

The order should not direct the defendant to pay the costs

of the proceedings to be taxed; but the costs should be taxed and inserted in the order as a part of the fine to be imposed. 9 *Paige*, 373; *and see* 2 *Id.* 104. And a reference to ascertain the costs and expenses of the proceedings may be ordered, in the discretion of the court. *See* 1 *Duer*, 546, *note.*

Where there are two or more defendants, the court may, in the imposition of the fines, charge an equal proportion of the whole costs and expenses upon each defendant. For forms of order or judgment of commitment, see *Appendix*, Nos. 284, 285.

Where Defendant to be Confined.] If the defendant is committed to prison upon a conviction for a contempt, it is the duty of the sheriff to keep the defendant in that part of the building appropriated for the purposes of a prison, and in the same manner as he is required by law to keep a person charged with a criminal offense. And it would be an escape to permit the defendant to go at large in the sitting room occupied by the sheriff's family, although such room is a part of the building which contains the jail. 10 *Paige*, 606; 4 *Id.* 282.

If the defendant is committed for the non-payment of costs, or other sum of money, he is entitled to the jail liberties, 2 *R. S.* 433, *sec.* 40; 4 *Paige*, 282; 3 *Id.* 397; otherwise, however, where he is committed for the non-payment of a fine, or of costs in the nature of a fine, imposed upon him. *Id. ibid.*; 10 *Paige*, *supra.* And the court cannot deny the jail liberties to a party who is entitled to them by law. So held, where the relator moved for an attachment against an attorney for the non-payment of costs, and that the jail liberties be denied to him until the costs were paid. 2 *Cowen*, 589.

Effect of Contempt in respect to Applications for Favors, &c.] In general, a party cannot apply to the court for a favor while he is in contempt. He must first purge his contempt by complying with the former order of the court; and until he does this the court will not grant an application in his favor which is not a matter of strict right. 1 *Paige*, 646;

4 *Id.* 450; *Clarke Ch. R.* 22; 1 *Barb. S. C. R.* 225; 4 *Sand. Ch. R.* 366; 15 *How. Pr. R.* 568. Thus, a defendant in contempt for the breach of an injunction, cannot be heard upon a motion to discharge a ne exeat against him in the same cause, until he has purged himself of the contempt, 1 *Clarke Ch. R.* 223; nor to open a default for not answering, 4 *Sand. Ch. R.* 366; nor to vacate the injunction for the violation of which the defendant is in contempt. 4 *How. Pr. R.* 225; 1 *Code R., N. S.* 137. Nor, in a suit in chancery, could a defendant in contempt move to refer a bill for impertinence. 1 *Moll.* 221. Nor, where he is in contempt for want of an answer, can he move to have the bill dismissed, even upon terms of giving the plaintiff all the advantage of a decree. 2 *Younge & Coll.* 70. The defendant, in such case, might purge his contempt by putting in either a plea or an answer to the whole bill, and paying the costs, after the service of the first or ordinary process of attachment to compel an answer. 10 *Paige*, 443.

But a party in contempt may be heard in court upon a motion to show that the proceedings against him have been irregular. 3 *My. & Craig*, 191; 1 *Moll.* 492; 1 *Dan.* 657; *Mose.* 258; 1 *Paige*, 646, 647. In such case, however, the party must confine his motion to the object of getting rid of the order of which he complains; and if he embraces other matters in his notice, he will not be allowed to go into them until he has shown that the order upon which his contempt was incurred, was irregular. *Id. ibid.* Nor is the party precluded by his contempt from making a motion in another cause, having reference to a distinct subject, though between the same parties. 1 *Russ. & My.* 103. Nor from making a motion to dismiss a bill for want of prosecution. 1 *Paige, supra.* Nor can a party object to a cause being heard, on the ground that the adverse party is in contempt. 7 *Sim.* 200.

And so, a party may be heard in opposition to any special application which the other side may make, upon notice duly served, notwithstanding that such party is in contempt. 1 *Dan.* 657.

It may also be observed, that parties in contempt are fre-

quently permitted to make applications to the court for favors, notwithstanding their contempt; but, in such cases, the applications will not be granted, except upon condition that the parties purge their contempt by complying with the former order of the court. Thus, where a defendant in contempt, applied, after the proofs in a cause were regularly closed, to examine a witness upon commission, the application was granted upon payment of the costs of the motion, and the costs necessary to be paid to purge his contempt. 1 *Paige*, 646; *and see* 4 *Sand. Ch. R.* 366, 368.

Release or Discharge of Parties Imprisoned.] In all cases which may arise under the statute, the court or tribunal ordering the imprisonment, may, in their discretion (in cases of inability to perform the requirements imposed), relieve the person or persons so imprisoned, in such manner and upon such terms as they may deem just and proper. 2 *R. S.* 538, *sec.* 20, *as amended by Laws of* 1843, *chap.* 9.

And so, where a party is committed for disobedience to an order in proceedings supplementary to execution, such party may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment, by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just. *Code of Pro.* § 302.

Where the defendant was committed for violating an injunction by selling property which equitably belonged to the plaintiff, and after two months' imprisonment, applied to be discharged, on the ground that he had no property or means with which to pay the fine,—the court refused the application because the defendant, instead of acknowledging his error, denied the offense of which he had been convicted, and thus impaired the credibility of his statement as to his ability to pay the fine. 4 *Sand. Ch. R.* 575.

If the defendant is committed for the non-payment of costs, or other sum of money, he may be discharged from imprisonment upon presenting a petition, and making an assignment of his property under the statute relating to vol-

untary assignments, by debtors imprisoned in execution in civil causes. 2 *R. S.* 31, *sec.* 1; *Laws of* 1847, *p.* 491, *sec.* 1; 3 *Paige*, 38, 43; 4 *Id.* 282; *and see* 1 *Hill*, 168. Such discharge, however, is not authorized, where the party is in execution for a fine imposed for a contempt of court, or where he is committed for the non-performance of some act or duty which it is in his power to perform. *Id. ibid.*

A party guilty of an ordinary contempt; as, where he is attached for neglecting or refusing to appear in pursuance of a subpœna, duly served, and the like, will in general be released from imprisonment, on doing the act for the non-performance of which the contempt was incurred, and paying the costs occasioned by his contumacy. 1 *Dan.* 660; *and see* 2 *Barb. Ch. Pr.* 282.

But a party will not be discharged for a mere irregularity in the proceedings in the course of which he was committed, if the officer has jurisdiction. 3 *Abb. Pr. R.* 302.

Costs.] The court is required, as we have seen, where the defendant's misconduct has produced a loss or injury to the relator, to impose a fine sufficient to indemnify the latter, and to satisfy his costs and expenses of the proceeding. 2 *R. S.* 538, *sec.* 21; 7 *Paige*, 364; 2 *Id.* 326; 1 *Duer*, 513. In all other cases, also, the defendant is liable for the costs and expenses, where he is found guilty of the alleged contempt. 2 *R. S.* 538, *secs.* 22, 23, 24, 25, *ante*. *Ib.* 619, *sec.* 42.

When allowed, the costs are to be at the rate allowed for similar services in civil actions. (*a*) *Laws of* 1854, *p.* 592, *ante*, *p.* 19; *and see* 9 *How. Pr. R.* 304; *s. c.* 3 *Duer*, 616. And the court may order a reference for the purpose of ascertaining the costs and expenses to which the party prosecuting the attachment is entitled. 1 *Duer*, 546, *note*.

In determining the amount of the costs and expenses which the defendant is to pay, the court may allow reasonable counsel-fees to the aggrieved party. Such fees form a part

(*a*) See further on the subject of costs, *ante*, p. 16, note.

of the expenses to which such party is justly entitled. 4 *Duer*, 148.

Appeals.] An appeal may be taken from the order or judgment of the court, the same as in other cases of special proceedings. *Laws of* 1854, *ante*, *p.* 19; *and see* 1 *Duer*, 453, *note*; *Ib.* 513; 5 *Selden*, 263; 9 *How. Pr. R.* 304, per Duer, J.; *s. c.* 3 *Duer*, 616; *Code of Pro.* § 11; *and see also ante*, *p.* 16, *note.*

But no appeal will lie from an order discharging the defendant from an attachment, 9 *How. Pr. R.* 97; nor from an order granting an attachment to bring the defendant into court. 4 *Paige*, 378.

The order adjudging a party in contempt should be filed or entered with the clerk of the court, before bringing the appeal. 10 *How. Pr. R.* 147.

The practice upon the appeal is regulated substantially by the Code of Procedure. *Laws of* 1854, *supra*; *and see ante*, *p.* 16, *note*; 9 *How. Pr. R.* 304, per Duer, J.; *s. c.* 3 *Duer*, 616.

The costs of the appeal, when allowed, are in the discretion of the court; and are regulated by the Code of Procedure. *Id. ibid.*

Parties in Contempt liable to Indictment, also.] Persons who have been proceeded against, as for contempt, under the provisions of the statute, are also liable to indictment for the same misconduct, if it be an indictable offense; but the court before which a conviction is had on such indictment, are required to take into consideration the punishment before inflicted, in forming its sentence. 2 *R. S.* 538, *sec.* 26.

CHAPTER XI.

PROCEEDINGS IN RELATION TO THE SALE OF INFANTS' ESTATES.

Section I. Sales in behalf of infants.
II. Proceedings to compel specific performance by infant, of contract of ancestor, &c.
III. Proceedings to compel infant trustees to convey.

The jurisdiction of the court to order the sale of real estate in behalf of infants, rests entirely upon the statute. Independently of an authority given by statute, the court has no power or right to entertain the question or to direct a sale. (*a*) 6 *Hill*, 416; 4 *Coms.* 257; 10 *Barb.* 555.

The first statutory provision on the subject was passed April 9, 1814. *Laws of* 1814, *p.* 128. An additional act, enlarging the powers of the chancellor, was passed in the

(*a*) If it is important to sell the real estate of an infant in a case not authorized by the statute, recourse must be had to the legislature. Where the rents and profits of an estate were given to a father for life, and the remainder in fee to his children, and it was necessary for the benefit of the tenant for life, and his family and children, that the estate should be sold, and a private act of the legislature was passed authorizing a sale for that purpose, and for the payment of debts incurred by the tenant for life in the necessary support of himself and family, and the education of his children,—it was held that the act of the legislature was valid, and that the deeds of conveyance executed in pursuance of it were binding upon the infants, and conveyed all their interest in the premises. 15 *Wend.* 436; *affirmed*, 20 *Id.* 365.

following year. *Laws of* 1815, *p.* 103. And in the revision of 1830, these acts were, in substance, embodied into the Revised Statutes; and they now constitute the law of this State. 2 *R. S.* 194 *to* 196.

The provision of the Revised Statutes (2 *R. S.* 194, *sec.* 169), authorizing the court to decree and compel the specific performance by an infant heir of the contract of his ancestor, was first adopted by the act of 1814 (*Laws of* 1814, *pp.* 128, 129, *sec.* 3); the object being to prevent the necessity of a special application to the legislature in cases where it was necessary to obtain the title before the infant became of age. See *Will. Eq. Jur.* 269.

The statutory provisions (2 *R. S.* 194, *secs.* 167, 168) compelling infants to convey real estate held by them by way of mortgage, or in trust only, for others, are in substance the same as in the original act, passed February 6, 1788. 2 *Laws of New York, Gr. ed.* 26; *and see* 1 *R. L. of* 1813, *p.* 148, *sec.* 7.

SECTION I.

SALES IN BEHALF OF INFANTS.

When Sale will be authorized.] The statute provides that any infant seized of any real estate, or entitled to any term for years in any lands, may by his next friend, or by his guardian, apply to the court for the sale or disposition of his property, in the manner authorized by statute. 2 *R. S.* 194, *sec.* 170; 4 *Coms.* 257.

And whenever it shall appear satisfactorily that a disposition of any part of the real estate of such infant, or of his interest in any term for years, is necessary and proper, either for the support and maintenance of such infant, or for his education; or that the interest of such infant requires or will be substantially promoted by such disposition, on account of any part of his property being exposed to waste and dilapidation, or on account of its being wholly unproductive,

or for any other peculiar reasons or circumstances, the court may order the letting for a term of years, the sale, or other disposition (*a*) of such real estate or interest, to be made by such guardian or guardians so appointed, in such manner, and with such restrictions, as shall be deemed expedient. 2 *R. S.* 195, *sec.* 175; 1 *Hop. Ch. R.* 122.

The authority to sell the real estate of infants, under the statute, was intended for the better education or maintenance of infants, and for their special and substantial benefit. 4 *Johns. Ch. R.* 378.

It is a sufficient ground to authorize a sale, that the real estate is held in common with adults, and that the value of the estate is small in comparison with the expense of a partition suit, to which it must otherwise be subjected. 2 *Paige*, 566.

The court has no power to direct the sale of infants' real estate, unless they are *seized* of the property. 4 *Coms.* 257. But it may order the sale of a vested remainder belonging to infants. *Ib.* The court, however, will not make an order authorizing the sale of a future interest in real estate belonging to infants, except under very special circumstances. And it is not sufficient to authorize a sale, that it will increase the income of an adult owner of a present interest in such estate. 2 *Barb. Ch. R.* 22.

But no real estate or term for years shall be sold, leased, or disposed of in any manner, against the provisions of any last will, or of any conveyance, by which such estate or term was devised or granted to such infant. 2 *R. S.* 195, *sec.* 176;

(*a*) Under the authority to sell, lease, or otherwise to *dispose* of the real estate of an infant, the court, instead of ordering the property to be leased or sold, frequently orders it to be *mortgaged*. And the application by the guardian or next friend may be made in the first instance for leave to mortgage, if that shall be thought the most eligible course. But leave to mortgage will not generally be granted except upon condition that the mortgage shall not be foreclosed before the infant attains the age of twenty-two years,—so that he may have one year after becoming of age to raise the money, by sale or otherwise, to pay the mortgage; as, otherwise, the property might be sold for half its value. 2 *Barb. Ch. Pr.* 218. The proceedings are substantially the same as on the application for leave to sell.

and see 10 *Barb.* 553. And where real estate, devised to an infant, was ordered by the court to be sold, contrary to the provisions of the devise, it was held that the sale was void, and that the deed passed no title to the premises. 6 *Hill*, 415.

Petition and Affidavits.] The statute authorizes the infant, by his next friend, or by his guardian, to apply to the court for leave to sell or dispose of the property. 2 *R. S.* 194, *sec.* 170. And by the rules of the Supreme Court it is provided, that an infant, by his general guardian if he has any, and if there is none by his next friend, may present a petition, stating the age and residence of the infant, the situation and value of his real and personal estate, the situation, value, and annual income of the real estate proposed to be sold, and the particular reasons which render a sale of the premises necessary or proper; and praying that a guardian may be appointed to sell the same. The petition shall also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given; and the petition shall be accompanied by affidavits of disinterested persons, or other proofs, verifying the material facts and circumstances alleged in the petition. If the infant is of the age of fourteen, he shall join in the application. *Sup. Court Rules*, 1858, No. 66. And if the infant has no general guardian, that fact must be stated in the petition. 3 *Paige*, 266.

And where several infants are interested in the same premises, as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians. *Sup. Court Rules*, 1858, No. 69.

The petition should be verified in the usual form, 3 *Paige*, 266; and should be addressed to the court to which the application is to be made; as "To the Supreme Court of the State of New York." 21 *Barb.* 348. For form of petition and affidavits, see *Appendix*, Nos. 287, 288.

Where, and How Application to be Made.] The application should be made to the Supreme Court, 2 *R. S.* 194, *sec.*

170; *Laws of* 1847, *p.* 323, *sec.* 16; or to the county court of the county where the premises are situated, *Code of Pro.* § 30, *sub.* 6; or to the Court of Common Pleas of the city and county of New York, when the premises are situated within the limits of that city, *Laws of* 1854, *p.* 464, *sec.* 6; or, in the city of Buffalo, to the Superior Court of that city, when the premises are situated therein. *Ib. p.* 224, *sec.* 9.

The application is ex parte, and should be made to the court at special term; and cannot be made to a judge at chambers. 21 *Barb.* 348. In respect, however, to the county court, the application may be made at any term of the court, or even out of term, or to the judge at chambers, that court being always open for the transaction of such business. *Code of Pro.* § 31. But whether the application, in such case, is made in court or out, the papers should recite the proceedings to have been in court.

Who may be Special Guardian.] The general guardian of infants is the proper person to be appointed special guardian to sell their real estate; and another person will not be appointed without some special reasons shown to the court; as, that the general guardian cannot procure the requisite security, or the like. 2 *Paige*, 412; 3 *Id.* 265.

A part owner of the property intended to be sold, and who is also a creditor against the infant's share, ought not to be appointed the special guardian to sell the property. 2 *Edw. Ch. R.* 113, per McCoun, V. C. And if such a person should be appointed, his accounts will be strictly scrutinized by the court. *Ib.*

Nor can a husband be appointed guardian to sell the estate of his infant wife. 4 *Johns. Ch. R.* 378. But although the husband cannot be appointed, in such case, yet a third person may be appointed, with the consent of the husband, to join him in the sale. 3 *Paige*, 265.

Appointment of Special Guardian.] The court, on the application, is required by the statute to appoint one or more

suitable persons guardians of the infant, in relation to the proceedings on such application. 2 *R. S.* 194, *sec.* 171.

And, therefore, if it satisfactorily appears that there is reasonable ground for the application, an order may be entered appointing a guardian for the purposes of the application, on his executing and filing with the clerk the requisite security, approved of as to its form and manner of execution, by a justice of the Supreme Court, or a county judge, signified by his approbation endorsed thereon. *Sup. Court Rules*, 1858, *No.* 67. For form of order, see *Appendix*, No. 289.

Bond of Guardian.] The guardian must give a bond to the infant, in such penalty, with such sureties, and in such form, as the court shall direct. 2 *R. S.* 194, *sec.* 172. For form, see *Appendix*, No. 290.

The court have provided, by general rule, that the security required on a sale of the real estate of an infant, shall be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond, over and above all debts; or a similar bond of the guardian only, secured by a mortgage on unencumbered real estate of the value of the penalty of such bond. *Sup. Court Rules*, 1858, *No.* 68. The security here required cannot be dispensed with, although the petition sets forth the inability of the infants to procure such security. 1 *Edw. Ch. R.* 507.

The condition of the bond is for the faithful performance of the trust reposed in such guardian; for the paying over, investing, and accounting for all moneys that shall be received by such guardian, according to the order of any court having authority to give directions in the premises; and for the observance of the orders and directions of the court in relation to such trust. 2 *R. S.* 194, *sec.* 172.

The bond must be duly proved or acknowledged, in like manner as deeds of real estate, *Sup. Court Rules*, 1858, *No.* 6; and must be approved of, as to its form and manner of execution, by a justice of the Supreme Court, or a county

judge, signified by his approbation endorsed thereon. *Ib. No.* 67. And when duly executed and approved, it should be filed in the office of the clerk where the order for the appointment of the guardian is entered. 2 *Paige*, 409.

If the bond be forfeited, the court will direct it to be prosecuted, for the benefit of the party injured. 2 *R. S.* 194, *sec.* 173.

But an action cannot be maintained upon the bond until proceedings for an account have been had against the guardian in a court of equity, 19 *Johns.* 304; 3 *Hill*, 77; *but see contra*, 5 *Paige*, 92; though, it seems, this would be otherwise under circumstances where it would be difficult to compel the parties to account. 3 *Hill*, *supra.*

Reference, and Proceedings thereon.] The order appointing a guardian, will also direct a reference to ascertain the truth of the facts stated in the petition, and whether a sale of the premises, or any and what part thereof, would be beneficial to the infant, and the particular reasons therefor; and to ascertain the value of the property proposed to be sold; and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the infant is in absolute need of any and what part of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions. And if there is any person entitled to dower in the premises, who is willing to join in the sale, also to ascertain the value of her life estate in the premises, on the principle of life annuities. *Sup. Court Rules*, *No.* 61. For form of order, see *Appendix*, No. 289; and for annuity table, see *Appendix* in *Sup. Court Rules.*

But no proceedings shall be had upon such reference until the guardian produces a certificate of the clerk, that the requisite security has been duly proved, or acknowledged, and filed agreeably to the order of the court; and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report. *Ib.* For

form, see *Appendix*, No. 291. And it is the duty of the clerk with whom the order is entered, before he gives the certificate to see that the bond or other security is executed by the proper persons, and in the form prescribed by the order of the court. 4 *Paige*, 46.

Where several infants are interested in the same premises, as tenants in common, and the application in behalf of all shall be joined in the same petition, as required by the rule, there shall be but one reference to ascertain the propriety of a sale as to all, notwithstanding that they may have several general guardians. *Sup. Court Rules*, 1858, *No.* 69.

The referee should not rely upon the petition as evidence of the facts he is directed to ascertain and certify to the court; but he should examine witnesses as to those facts. *See* 4 *Paige*, 44; *and* 3 *Id.* 265.

Referee's Report.] The referee, after ascertaining the truth of the matters required under the order of reference, must make his report to the court.

Under the late practice, where the facts alleged in the petition were found to be true, it was sufficient for the referee to report briefly in reference to those facts; and he was required only to state generally in his report that, from the examination of the witnesses before him, he had ascertained that all the matters set forth in the petition were true. *See* 4 *Paige*, 44, 46. And it was sufficient, also, if he stated briefly the result of his inquiries as to the other matters which he was required to ascertain. *Ib.*

But under the recent amendment to the rules, the report of the referee is required to contain in itself, a statement of the particular reasons which, in the opinion of the referee, render a sale of the premises necessary or proper, and of all the facts required to be ascertained and reported; and he cannot now refer to the petition or affidavits for such statements. *Sup. Court Rules*, 1858, *No.* 67. For form of report, see *Appendix*, No. 292.

Order thereupon.] If the report of the referee is in favor

of the application, and the proceedings are regular, and it appears satisfactorily to the court that such sale is necessary and proper, the court will authorize the guardian to contract for the sale or other disposition of the property. 2 *R. S.* 195, *secs.* 175, 177. For form of order, see *Appendix*, No. 293.

Agreement of Sale and Report of Guardian.] After an agreement for a sale, leasing, or other disposition of the property has been made in pursuance of such order, the same must be reported to the court on the oath of the guardian making the same; and if the report be confirmed, a conveyance will be authorized to be executed under the direction of the court. 2 *R. S.* 195, *sec.* 177.

The agreement for the sale or other disposition of the property, should be made in writing, subject to the ratification of the court. It should specify the terms of the sale, the manner in which the purchase money should be secured, and the time of payment. And, to prevent any dispute with respect to the terms and conditions of the sale, it should be signed by the special guardian, and the purchaser. 9 *Paige*, 365. For form of report, see *Appendix*, No. 294.

Order of Confirmation.] If the agreement made by the guardian is approved by the court, it will direct an order to be entered, confirming his report, and directing a conveyance to be executed to the purchaser on his complying with the terms of sale. *See* 2 *R. S.* 195, *sec.* 177. For forms, see *Appendix*, No. 295.

The order will also direct as to the manner in which the proceeds of the sale, if less than five hundred dollars, are to be invested or applied for the infant's benefit, after the costs of the proceedings are deducted, and will direct the guardian to make a return to the court of such investment or disposition. And the order will also provide for the payment or satisfaction of any claim of dower to which the premises are subject. 2 *Barb. Ch. Pr.* 215.

Conveyance by Special Guardian.] Upon the report being

confirmed, the special guardian will execute a conveyance of the premises, in pursuance of the direction of the court. 2 *R. S.* 195, *sec.* 177, *supra.*

The guardian should strictly pursue the order of the court in respect to the manner of execution of the conveyance. He cannot convey the premises, except pursuant to such order. *See* 1 *Kern.* 52.

Effect of such Conveyance.] All sales, leases, dispositions, and conveyances, made in good faith by the guardian, in pursuance of the orders of the court, when so confirmed, shall be valid and effectual as if made by such infant when of full age. 2 *R. S.* 195, *sec.* 178.

The sale, however, would be invalid, if the order appointing the special guardian was fraudulently obtained,—at least as to all persons who were parties or privies to the fraud. 17 *Barb.* 202; *and see* 4 *Sand. Ch. R.* 1. And so, the sale would be void, if ordered by the court contrary to the provisions of any last will, or of any conveyance by which the estate was devised or granted to such infant. 6 *Hill*, 415; 2 *R. S.* 195, *sec.* 176.

Where the court directs the sale of a farm in which four infants, as tenants in common, had a fee determinable as to each on his death without issue, and in which there was a devise over to the survivors upon such contingency,—it will be deemed that the court intended that the purchaser should acquire the whole title, and on any of the proceeds coming within the control of the court, it will require the infants, on becoming of age, to convey to the purchasers, as a condition of receiving such proceeds. 3 *Sand. Ch. R.* 456.

How Mortgages to be given.] If a mortgage upon real estate is ordered to be taken for the purchase money of the premises, or any part thereof, the same must be taken in the name of the treasurer of the county in which the order of sale is entered, or such other county treasurer as the court shall direct. *Sup. Court Rules*, 1858, *No.* 81; *Laws of* 1848, *p.* 404, *sec.* 1; *and see Laws of* 1847, *p.* 340, *sec.* 71. Or, the

court may direct the mortgage to be taken by and in the name of the general or special guardian of such infant. *Laws of* 1848, *p.* 407, *sec.* 8.

The Proceeds of the Sale.] From the time of the application to the court, the infant is considered a ward of the court, so far as relates to the property to be sold, its proceeds and income; and the court shall make order for the application and disposition of the proceeds of such property, and for the investment of the surplus belonging to such infant, so as to secure the same for the benefit of such infant, and shall direct a return of such investment and disposition to be made on oath, as soon as may be, and shall require accounts to be rendered periodically by any guardian or other person who may be entrusted with the disposition of the income of such proceeds. 2 *R. S.* 195, *sec.* 179.

If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security by mortgage upon real estate, he is required to bring the proceeds into court, or to invest the same under the direction of the court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court. *Sup. Court Rules*, 1858, *No.* 69.

If the moneys are brought into court, they should be paid to the county treasurer of the county in which the order of sale is entered. *Ib. Rule* 81; *Laws of* 1848, *p.* 404, *sec.* 1.

It is also provided by the statute, that the court may order any bond, mortgage, stocks, securities or moneys, in the possession or under the control of any county treasurer, to be transferred and delivered to the general or special guardian of an infant, upon his giving security to the satisfaction of the court for the faithful execution of the trust. *Laws of* 1848, *p.* 407, *sec.* 8.

And if the court has ordered any bond, mortgage, or other securities to be taken in the name of the guardian, the same shall be collected and invested by him as the court may

direct. And such guardian shall annually file a report in the county clerk's office of the county where the property is situated. *Ib.*

But no moneys arising from the sale of the real estate of an infant under the order of the court shall be paid over to his general guardian, except so much thereof, or of the interest or income from time to time, as may be necessary for his support or maintenance; unless such guardian has previously given sufficient security on unincumbered real estate, to account to the infant for the same, in the usual form. *Sup. Court Rules*, 1858, *Nos.* 62 *and* 70; *and see Code of Pro.* § 420; *Laws of* 1848, *p.* 407, *sec.* 8.

And no order shall be made for the payment of any such moneys to any person claiming the same, except upon petition, accompanied by a certified copy of the order in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the funds, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee, to take proof and report thereon. *Sup. Court Rules*, 1858, *No.* 70.

Rights of Infant in Proceeds.] The statute declares that no such sale of the real estate of an infant, shall give to such infant any other or greater interest or estate in the proceeds of such sale, than he had in the estate sold. 2 *R. S.* 195, *sec.* 180.

The object of this provision was to protect the interests of those who might have future estates, vested or contingent, in the real estate sold. 1 *Kern.* 551, per Ruggles, J.; *and see* 4 *Coms.* 267.

Where the shares of several infants were determinable fees, with executory devises to the survivors, and the whole estate in the land was sold, it was held on the death of one of the infants, by which the devise over in her share would

have taken effect if the land had not been converted, that her share of the proceeds must be paid to the executory devisees, and that her personal representatives had no right to such share. 3 *Sand. Ch. R.* 456. But the interest which accrued on the proceeds in her lifetime, belongs to such representatives. *Ib.*

The Proceeds are to be deemed Real Estate.] The sale authorized by the statute is not only not to give an infant any other or greater interest in the proceeds of the sale than he had in the estate sold; but the proceeds are to be deemed real estate of the same nature as the property sold. 2 *R. S.* 195, *sec.* 180. And if the infant die under age, the proceeds will be subject to the same law of succession as the property which produced them. 1 *Duer*, 286.

But the character thus impressed upon the proceeds, ceases on the infant's attaining his majority and obtaining possession thereof. Accordingly, where the real estate of an infant was sold by order of the court, and a bond and mortgage thereon were taken to his special guardian to secure the purchase money; and the infant, after his majority, settled the guardian's account touching the trust and discharged him therefrom, took from him individually a receipt for the bond and mortgage, and constituted him his attorney to collect and reinvest the amount secured thereby in his discretion; and before the payment of any part of the amount, died intestate,—it was held, that the bond and mortgage and the moneys secured thereby were personal estate, and to be distributed as such. 1 *Kern.* 544, *overruling* 7 *Barb.* 215. The object of the statute was to preserve during the infant's minority, the character of the property in reference to the statutes regulating descents and distributions. *Id. ibid.; and see* 3 *Sand. Ch. R.* 456, 464.

Accounts of Guardians, &c.] The special guardian within six months after the order confirming the sale of the estate, or any part thereof, is required to file in the office where the appointment is entered, a just and true inventory, under

oath, of the whole estate committed to his care or guardianship, and of the manner in which any funds under his care or control, belonging to the estate, are invested; stating the income and profits of the funds or estate, and the debts, credits, and effects, so far as the same have come to his knowledge. *Ch. Rules*, 1844, *No.* 154; 2 *R. S.* 195, *sec.* 179.

The special guardian is also required annually thereafter, so long as any part of the proceeds remains in his hands, or under his care or control, to file in the same office an inventory and account, under oath, of such guardianship or trust, &c. *Ib.; and see Laws of* 1848, *p.* 407, *sec.* 8. If he neglects to file such inventory and account, as required by the above rule, in the settlement of his accounts, every presumption will be taken most strongly against him. 3 *Paige*, 146. And the court will order him to file the inventory and account, and to pay the expense of the order and proceedings thereon, in twenty days, or that an attachment issue against him. 2 *Id.* 409.

Claim of Dower; how Satisfied, &c.] If the real estate of an infant, or any part of it, shall be subject to dower, and the person entitled thereto shall consent in writing to accept a gross sum in lieu of such dower, or the permanent investment of a reasonable sum, in such manner as that the interest thereof be made payable to the person entitled to the said dower, during life, the court may direct the payment of such sum in gross, or the investment of such sum as shall be deemed reasonable, and shall be acceptable to the person entitled to such dower, in manner aforesaid; which sums so paid or invested, shall be taken out of the proceeds of the sale of the real estate of such infant. 2 *R. S.* 196, *sec.* 181. But before any such sum shall be paid, or such investment made, the court shall be satisfied that an effectual release of such right of dower has been executed. *Ib. sec.* 182. For the rule by which to compute the gross value of a widow's dower, see *Appendix* to Supreme-court Rules.

Costs.] If the infant's interest in the property does not

exceed one thousand dollars, the whole costs, including disbursements, shall not exceed twenty-five dollars. *Sup. Court Rules*, 1858, *No.* 69.

But if several infants are joined in the same application, or several parcels of land are sold at different times, an allowance may be made for the extra expense beyond the twenty-five dollars at which the costs are limited. 4 *Paige*, 44.

Where there are several infants, who are interested in the same premises, as tenants in common, and the application in behalf of all shall be joined in the same petition, as required by the rule, but one bill of costs will be allowed, notwithstanding that they may have several general guardians. *Sup. Court Rules*, 1858, *No.* 69.

Final Report, and order thereon.] After the sale has been consummated, by the payment of the purchase money and the delivery of the deed to the purchaser, the guardian should make a final report of his proceedings to the court; stating what deduction has been made from the proceeds for costs, and the disposition that has been made of the balance. And an order should then be obtained confirming the report and the sale and conveyance, and the disposition of the proceeds. 2 *Barb. Ch. Pr.* 217.

SECTION II.

PROCEEDINGS TO COMPEL SPECIFIC PERFORMANCE BY INFANT OF CONTRACT OF ANCESTOR.

In what Cases.] At the common law, if the estate of the contracting party devolved upon an infant, by the death of the party to the contract, the remedy to enforce specific performance was delayed until the infant became of age. *Adams's Eq.* 81; *Will. Eq. Jur.* 269.

But by the statute, it is provided, that the court shall have power to decree, and compel, a specific performance by an infant heir or other person, of any bargain, contract, or agreement, made by any party who may die before the performance thereof, on petition of the executors or administrators of the estate of the deceased, or of any person or persons interested in such bargain, contract, or agreement, and on hearing all parties concerned, and being satisfied that the specific performance of such bargain, contract, or agreement ought to be decreed or compelled. 2 *R. S.* 194, *sec.* 169; 17 *Barb.* 162.

A specific performance between an infant and a surviving party to the contract, will, in general, be ordered when a specific performance would be decreed between the original parties, unless there are some intervening equities controlling the case. *Will. Eq. Jur.* 269; *and see* 10 *Paige*, 343. And the heir will be compelled to convey, in such case, notwithstanding that he is not named in the contract. 17 *Barb.* 162.

Where the infant is a resident of the State, and the lands which the ancestor had contracted to convey are situated in another State, the court may decree a specific performance of the contract, and direct a conveyance by the infant when he arrives at the proper age to enable him to do so, according to the laws of the State where the property is situated; and

that in the mean time the vendee be permitted to take and to retain the possession of the premises until that time, if he can obtain possession thereof without suit. 9 *Paige*, 280, 282.

Where, and how, Application to be made.] The application should be made to the Supreme Court at special term, 2 *R. S.* 194, *sec.* 169 ; *Laws of* 1847, *p.* 323, *sec.* 16 ; 21 *Barb.* 348 ; or, to the county court of the county where the premises are situated, *Code of Pro.* § 30, *sub.* 6 and 7 ; or, to the Court of Common Pleas of the city and county of New York, when the premises are situated within the limits of that city, *Laws of* 1854, *p.* 464, *sec.* 6 ; or, in the city of Buffalo, to the Superior Court of that city, when the premises are situated therein. *Ib.* 224, *sec.* 9.

The application is by petition, addressed to the court in which the motion is to be made. It should set forth clearly the facts on which the title to relief is founded ; and should be verified in the usual form. For form of petition, see *Appendix*, No. 297.

All the parties concerned are entitled to be heard on the application. 2 *R. S.* 194, *sec.* 169. Notice of the motion, therefore, should be served upon the parties interested, accompanied with copies of the petition and other papers on which the motion is founded. For form of notice, see *Appendix*, No. 298.

Guardian ad litem.] A suitable and proper person should be appointed to act as guardian for the infant ; whose duty it will be to examine into the circumstances of the case, so far as to enable him to make the proper defence, if necessary for the protection of the rights of the infant. *Sup. Court Rules*, 1858, No. 61 ; 1 *Kern.* 52. And it is the duty of every attorney or officer of the court to act as the guardian of any infant defendant in any proceeding against him, whenever appointed for that purpose by an order of the court. *Sup. Court Rules*, No. 61, *supra.*

Such guardian will be appointed upon the application of

the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the petition and notice of motion. If he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the proceeding, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one, within this State; if he has none, then to the infant himself if over fourteen years of age; or, if under that age, and within this State, to the person with whom such infant resides. *Code of Pro.* § 116; and see 2 *Paige*, 306; *Eq. Rules*, 1847, No. 98.

The appointment may be made by the court in which the proceeding is brought, or by a judge thereof, or a county judge. *Id. ibid.; Code of Pro.* § 115.

But no person will be appointed guardian ad litem, either on the application of the infant or otherwise, unless he is the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and who has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. Nor will any person be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defence or prosecution of the proceeding. *Sup. Court Rules*, 1858, No. 60.

No guardian ad litem for the infant, unless he has given security to the infant, according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the proceeding, except such costs and expenses as may be allowed by the court, to the guardian, out of the fund, or recovered by the infant in the proceeding. See *Ib.* No. 62; and see *Code of Pro.* § 420.

The guardian ad litem is entitled to such compensation for his services as the court may deem reasonable. *Sup. Court Rules*, 1858, No. 61. And where the infant has derived no property from the person from whom the premises have

descended, except that in respect to which the specific performance is sought, the costs of the guardian ad litem must be paid by the applicant. See 9 *Paige*, 280, 283.

Reference, and Proceedings thereon.] The court may order a reference to some suitable person, to ascertain the facts, and report the same to the court; or it may dispose of the application without such reference, in its discretion. 1 *Barb. Ch. Pr.* 468; 1 *Kernan*, 53; *Laws of* 1847, *p.* 344, *sec.* 77.

After ascertaining the matters required, under the order of reference, the referee must make his report to the court. And upon the coming in of his report, the same shall be filed, and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause, or proceeding; and the report will become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the same. *Sup. Court Rules*, 1858, No. 32.

If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein. *Ib.*

Order directing Performance of Contract.] If the court is satisfied from the report of the referee, or otherwise, that a specific performance of the contract should be decreed, an order, directing a conveyance of the premises and the performance of the contract, will be directed to be entered in the usual form.

The Conveyance.] Neither infants, nor guardians appointed for that purpose, can convey land, except pursuant to the order of the court. 1 *Kern.* 52. And therefore, where an order directed infants to convey all their interest in certain real estate,—*the deed to be executed by J. S. M. the guardian ad litem, in the name and behalf of the infants*, and the deed recited the appointment of J. S. M. as their guardian, in which they were named as parties of the first part, without

the guardian's name being mentioned, and which was executed and acknowledged by the infants and by J. S. M., without any addition to his signature indicating the character in which he executed,—it was held that the deed was not pursuant to the order, or one which the purchaser was bound to accept. *Ib.*

Under such an order, a deed reciting the names of the infant heirs, by J. S. M., their guardian, as parties of the first part, but executed by him by subscribing "J. S. M., guardian, &c.," is defective. The guardian should execute the deed by subscribing the name of the infant, and adding "by J. S. M. his guardian ad litem." *Ib.*, per Selden, J.; and see 2 *Edw. Ch. R.* 204; 2 *Johns. Ch. R.* 537.

Where the ancestor stipulates to convey the premises with covenants as to title, the court will not require the infants to enter into personal covenants. 5 *Johns. Ch. R.* 261; *and see* 1 *Kern.* 52. They are only bound to fulfill the contract to convey, to the extent of the estate that descends to them. 17 *Barb.* 162. "If they are to be bound by covenants at all," says Selden, J., "it should obviously be to the same extent *only* as they would have been bound by the covenants of the ancestor, had the deed been executed by him; a liability which would, of course, be limited by the amount of their inheritance from the ancestor, and should be so expressed in the deed executed by the heirs." 1 *Kern.* 56, *supra.*

But the purchaser is entitled to some security that his title will be good. And, therefore, in a case where the ancestor had contracted to convey with full covenants as to title, the court ordered the purchase money to be invested, and the principal retained, subject to the further order of the court on the infant's coming of age; to the end that an indemnity might be provided for the purchaser, if the title should in the mean time fail. 5 *Johns. Ch. R.* 261, 262, *supra.*

Appeals.] An application to the court to compel a specific performance by infant heirs of a contract for the sale of lands, made by the ancestor, is a special proceeding, 1 *Kern.*

52; and an appeal may be taken from an order therein to the general term, the same as in other cases of special proceedings. *Laws of* 1854, *p.* 592, *ante*, *p.* 19, *note; Laws of* 1857, *vol.* 1, *p.* 753; *and see Code of Pro.* §§ 344 *to* 349.

The practice upon the appeal is regulated substantially by the Code of Procedure; sections 327, 329, 330, and 332, of which, are expressly made applicable in such cases. (*a*) *Laws of* 1854, *p.* 592, *supra; and see* 9 *How. Pr. R.* 304; *s. c.* 3 *Duer*, 616.

From the decision of the court at general term, an appeal may be taken to the Court of Appeals. *Code of Pro.* § 11; 1 *Kern.* 52; *and see Ib.* 276; 2 *Id.* 409, *Laws of* 1857, *vol.* i. *p.* 753.

The costs of the appeal, when allowed, are in the discretion of the court; and are regulated by the Code of Procedure. *See Laws of* 1854, *ante*, *p.* 19; *Code of Pro.* § 318; 9 *How. Pr. R.* 304; *s. c.* 2 *Duer*, 616; *and see ante*, *p.* 16, *note.*

(*a*) See these sections, *ante*, *p.* 20. And see further on the subject of appeals, *ante*, *p.* 16, *note.*

SECTION III.

PROCEEDINGS TO COMPEL INFANT TRUSTEES TO CONVEY.

In what Cases.] The statute provides that whenever any infant shall be seized or possessed of any lands, tenements, or hereditaments, by way of mortgage, or in trust only, for others, the court on the petition of the guardian of such infant, or of any person in any way interested, may compel such infant to convey and assure such lands, tenements, and hereditaments, to any other person, in such manner as the court may direct. 2 *R. S.* 194, *sec.* 167.

Application, where made, &c.] The application must be made to the Supreme Court, 2 *R. S.* 194, *sec.* 167; *Laws of* 1847, *p.* 323, *sec.* 16; and at the special term of such court. 21 *Barb.* 348. It is founded upon petition, addressed "To the Supreme Court of the State of New York." *Ib.* Notice of the application should be served upon the parties interested in the usual manner. For forms of petition and notice, see *Appendix*, Nos. 299, 300.

Guardian ad litem.] If the application is made by any other than the guardian of the infant, the court will appoint a guardian ad litem, to look after the interest of such infant in the proceeding. See *ante*, *p.* 435, "Guardian ad litem."

Reference, and Proceedings thereon.] The court may order a reference to some suitable person to ascertain the facts, or it may dispose of the application without such reference, in its discretion. See 1 *Barb. Ch. Pr.* 468; 1 *Kernan*, 53; *Laws of* 1847, *p.* 344, *sec.* 77.

If a reference is ordered, the referee must proceed in the usual way, and after ascertaining the matters required by the

order of reference, must make his report to the court. And upon the coming in of such report, the same shall be filed, and a note of the day of the filing entered by the clerk in the proper book, under the title of the proceeding, and the said report shall become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein. *Sup. Court Rules*, 1858, *No.* 32.

If the court is satisfied from the report of the referee, or otherwise, that the facts stated in the petition are true, and that the property should be conveyed or assured to the petitioner or party in whose behalf the application is made, an order directing such conveyance and assurance will be directed to be entered.

Effect of Conveyance.] Every conveyance or assurance made pursuant to an order of the court on such application, shall be as good and effectual in the law, as if the same were made by such infant when of lawful age. 2 *R. S.* 194, *sec.* 168.

Costs.] The *cestui que trust* must pay the necessary costs of the proceedings to obtain the transfer of the title. 9 *Paige*, 280, 283; 2 *Edw. Ch. R.* 415; *and see* 1 *Barb. S. C. R.* 499.

Appeal from Order.] The order made on such application, is an order in a special proceeding, and an appeal may be taken therefrom to the general term. *Laws of* 1854, *p.* 592; 1 *Kern.* 52; *and see ante, p.* 16, *note.*

From the decision of the court, at general term, an appeal lies to the Court of Appeals, *Code of Pro.* § 11; *and see* 1 *Kern. supra; Ib.* 276; 2 *Id.* 409; and see the subject of "Appeals," in the proceedings to compel specific performance by infants of the contract of their ancestor, *ante, p.* 438.

CHAPTER XII.

PROCEEDINGS FOR THE SALE OF THE REAL ESTATE OF RELIGIOUS CORPORATIONS.

At the common law, every corporation aggregate, including religious corporations, had unlimited power over its property. It might alienate the same in fee, or grant any lesser estates therein, without limitation or restriction. *Coke Litt.* 44, *a.* 300; 7 *Paige*, 83; 16 *Barb.* 241; 23 *Id.* 333; 3 *Barb. Ch. R.* 122.

But this common-law right, in respect to the disposition of church property, or the property of religious corporations, was taken away, in England, at an early day, by several restraining statutes. See 1 *Evans' Statutes*, 381 *to* 390. And although those statutes were never re-enacted in this State, yet they were believed to have become a part of the laws of the colony, upon its settlement by emigrants coming hither from the mother country. "For it is a natural presumption," says Chancellor Walworth, "and therefore adopted as a rule of law, that on the settlement of a new territory by a colony from another country, and where the colonists continue subject to the government of the mother country, they carry with them the general laws of that country, so far as those laws are applicable to the colonists in their new situation; which thus become the unwritten law of the colony, until altered by common consent or legislative enactment." 3 *Barb. Ch. R.* 122; and see 23 *Barb.* 333.

Acting upon that presumption, and deeming it important

that provision should be made by which religious corporations might be enabled to dispose of their real estate, the legislature, in March, 1806, passed an act authorizing the chancellor upon the application of a religious corporation, in case he should deem it proper, to make an order for such sale, and for the application of the proceeds thereof to such uses as the corporation, with his consent and approbation, should conceive to be most for the interests of the society to which the real estate so sold belonged. *Id. ibid; Laws of* 1806, *p.* 90; *Will. Eq. Jur.* 734. But that provision was not to extend to any of the lands granted by the State for the support of the Gospel. *Id. ibid.* (*a*)

The act thus passed, was afterwards embodied in the general act for the incorporation of religious societies (2 *R. L.* 218, *sec.* 11), and continues at this day, the law of the State (3 *R. S.* 3*d ed.* 249; 1 *Id.* 4*th ed.* 1184), except, as we shall see hereafter, the power to consent to the sale of the property, and to direct the application of the proceeds, is now devolved upon other tribunals than the Court of Chancery.

To what Courts Application to be Made.] Formerly, as we have seen, the application was required to be made to the chancellor; but that office having been abolished by the constitution of 1846, the powers of the chancellor were conferred upon the Supreme Court. 3 *R. S.* 3*d ed.* 249; 1 *Id.* 4*th ed.* 1184; *Const. art.* 14, *sec.* 8; 23 *Barb.* 327; *s. c.* 4 *Abb. Pr. R.* 182; *Laws of* 1847, *p.* 323, *sec.* 16.

Jurisdiction in this proceeding is also now given to the

(*a*) In respect to burying grounds, it is further provided by statute, that it shall not be lawful for any church or religious corporation to mortgage any burying ground used for the interment of human remains, for the use of which they shall have received compensation, without the previous consent in writing of three-fourths in number of the congregation or society of such church or corporation; which consent shall be proved or acknowledged, in the same manner as deeds are now required by law to be proved or acknowledged, and shall thereupon be recorded in the office of the register of the city, or clerk of the county, in which such burying ground is situated. *Laws of* 1842, *p.* 259; and see 7 *How. Pr. R.* 477.

county court of the county where the premises are situated. *Laws of* 1847, *p.* 643, *sec.* 28; *Code of Pro.* § 30. Also, to the Court of Common Pleas of the city and county of New York, when the premises are situated within the limits of that city, *Laws of* 1854, *p.* 464, *sec.* 6; and, in the city of Buffalo, to the Superior Court of that city, when the premises are situated therein. *Ib. p.* 224, *sec.* 9.

When Religious Corporations may Sell, and the Authority of the Court.] Religious corporations have still an unlimited authority to sell or dispose of their real estate; provided, however, that they sell with the consent and approbation of the court. 7 *Paige*, 84. "I have no doubt," observes Chancellor Walworth, in the case cited, "that the intention of the act of March, 1806, was to give to every religious corporation an unlimited power to convey any real property held by them in trust for the corporators; provided, the previous consent of this court to such alienation of the church property and a direction for the proper application of the proceeds thereof for the benefit of the corporators, was obtained, in the summary mode which is there prescribed." And see *Will. Eq. Jur.* 735.

The previous assent of the court must, therefore, be obtained to every sale of the real estate of a religious corporation; and without such assent, it is doubtful whether a subsequent ratification by the court would give validity to it. (*a*) *See* 7 *Paige*, 84. But the court has power only to ratify or veto a sale made by the corporation. It may withhold its assent to a sale, and thus compel the corporation to retain the property; but it has no power to dictate to the corporation how, or to whom, it shall sell, or to require it to sell against its will, or otherwise to control it in the disposition of its property, or of the proceeds thereof. 16 *Barb.* 237; 23 *Id.* 335; *s. c.* 4 *Abb. Pr. R.* 182.

(*a*) Nor can a religious corporation submit the question of sale to an arbitrator for decision. And if an arbitrator is chosen, and he decides the property shall be sold, his award is not binding upon any one, and gives no authority to make the sale. 23 *Barb.* 327; *s. c.* 4 *Abb. Pr. R.* 182.

But the order of the court is not necessary to give validity to a mortgage executed by a religious corporation for a portion of the consideration money of premises purchased. 18 *Barb.* 36. "I am satisfied," says Mr. Justice Parker, in the the case cited, "that such an order was never necessary to enable a religious corporation, purchasing land, to execute a mortgage for the purchase-money. The church never owned the land, except subject to the mortgage. It was a question of purchase, rather than of sale. The statute is only applicable to a case where the church is the owner of real property; and its object is, that the court may control the disposition of the proceeds, and prevent a misapplication of trust funds." *Ib.* 49.

Nor is the consent of the court necessary to enable the corporation to sell the pews in its church, 5 *Cowen*, 494; otherwise, however, if an absolute sale is intended. 16 *Barb.* 237; 8 *Id.* 147, *aff.* 17 *Id.* 104.

The authority of the court to make an order for the sale of the real estate of a religious corporation, relates to cases where the absolute right and title to lands belonging to the corporation, are to be sold. 5 *Cowen*, *supra.* And Woodworth, J., remarks in the case cited, that cases of that kind may and do occur. "It is often necessary," he observes, "to sell a portion of the real estate for the advancement of the residue. Sometimes it becomes necessary to sell the church and lot, when a new church is built and located at a different place. In all these cases, the purchasers acquire the absolute inheritance; and to such only, in my opinion, does the statute apply. A sale of real estate *ex vi termini*, means an absolute transfer of the property. But the sale of pews in a church, is not a sale of real estate, within the meaning of the act. By the grant of a pew, the grantee acquires a limited usufructuary right only. He may use it as a pew in a house of religious worship; but has not an unlimited, absolute right. He cannot use it lawfully for purposes incompatible with its nature. The right, too, is limited as to time. If the house be burnt, or destroyed by time, the right is gone." And see 8 *Barb.* 147, *aff.* 17 *Id.* 104; 16 *Id.* 237.

How, and by whom application to be made.] The application is ex parte; and should be made to the court at special term. If the proceeding, however, is instituted in the county court, the application may be made at any term of the court, or even out of term, or to the judge at chambers, that court being always open for the transaction of such business. *Code of Pro.* § 31. But, in such case, whether the application is made in court, or out, the papers should recite the proceedings as in court.

The application must be made by and in the name of the corporation; and the court has no power to grant an order of sale upon the application of the trustees, or otherwise than upon the application of the corporation. 23 *Barb.* 327; *s. c.* 4 *Abb. Pr. R.* 182; *and see* 1 *Kernan*, 94; *Id.* 243.

The corporation consists of every member of the congregation having the privilege of voting; and the acts of a majority are binding upon the whole. 23 *Barb. supra; and see* 16 *Id.* 243, per Harris, J.

And where the court made an order giving its consent to the sale of property, on the petition of a majority of the board of trustees, but such petition had not been authorized or sanctioned by a majority of the corporators, and the order was still *in fieri*, and not executed, no rights having been acquired under it,—it was held that the order was still under the control of the court, and that it was competent for the court to revoke its consent. 23 *Barb.* 327, *supra.* And it appearing to the court, in that case, that a sale of the property would be in opposition to the views of a large majority of the corporators, the previous order of sale was revoked.

The application is by petition, which should set forth the lands desired to be sold, and the disposition which the corporation proposes to make of the proceeds of the sale. And the petition, or affidavit accompanying it, when presented by the trustees in behalf of the corporation, should allege that the application was authorized by a majority of the corporators thereof, or otherwise show that such application was made in their behalf, and with their assent. *See* 23 *Barb.* 327, *supra.* For form, see *Appendix*, No. 301.

It is not necessary for the corporation to show that it has found a purchaser for the premises proposed to be sold; but a conditional order can be made authorizing a sale at a price not less than a sum fixed by the court, and so that if a purchaser cannot be found at that sum, there will be no sale. 3 *Edw. Ch. R.* 157, *post.*

Reference to Ascertain Facts.] The court may order a reference to some suitable and proper person to ascertain the facts, and report the same to the court; or it may dispose of the application without such reference, in its discretion. 1 *Barb. Ch. Pr.* 468; *Laws of* 1847, *p.* 344, *sec.* 77. But in respect to the propriety and effect of references, in such cases, where the proceedings are contested, *see* 16 *Barb.* 239, per Harris, J.

Order of the Court, and Disposition of the Proceeds.] If the application is approved by the court, an order will be entered directing a sale of the premises in pursuance of the prayer of the petition. The order will direct the sale to be made by the trustees of the corporation; or, it seems, the sale may be directed to be made by a referee, or other officer, appointed or selected for that purpose. 3 *Coms.* 238.

If the persons proposing to purchase the property, have not actually agreed to buy, a provisional order may be entered, in the first instance, authorizing a sale generally, at a price not less than a sum fixed by the court. And if a purchaser "be found, and an actual agreement is made, the court, by a subsequent order, can approve or confirm it, and direct the application of the proceeds." *See* 3 *Edw. Ch. R.* 157.

The order of the court will also direct the uses to which the proceeds of the sale shall be applied.

And the court will not direct the proceeds to be distributed among the original contributors and pew-holders, on the application of a minority of the corporators. 16 *Barb.* 237, 242. But "in case of a sale, the proceeds are to be applied to such uses as *the corporation*, with the consent and

approbation of the court, shall conceive to be most for the interest of the society. The authority of the court is entirely *negative*. It may withhold its assent, and thus prevent the application of the proceeds in any specified manner; but it cannot direct the corporation how to apply the moneys. It is the right of the corporation to designate the object for which the moneys arising from the sale of its real estate shall be used. If the object thus designated, meet the approval of the court, the appropriation will be made. If not, the money must be retained by the corporation until it can make such an application of it as will secure the consent and approbation of the court." *Ib.*, per Harris, J. For form of order, see *Appendix*, No. 302.

CHAPTER XIII.

SUMMARY PROCEEDINGS TO RECOVER THE POSSESSION OF LAND, IN CERTAIN CASES.

The proceeding under this Chapter, giving the landlord a summary remedy in certain cases, was first authorized by statute in 1820. *Laws of* 1820, *p.* 176. Prior to that time, the landlord was obliged, in such cases, to resort to his action, which was dilatory and expensive. The law of 1820 was afterwards incorporated, with some material modifications, into the Revised Statutes, the provisions of which have also been altered and amended from time to time. 2 *R. S.* 512; *Laws of* 1849, *p.* 291; *Laws of* 1851, *p.* 852; *Laws of* 1857, *chap.* 684, *vol.* 2, *p.* 509.

These statutory provisions being in derogation of the common-law rights of tenants, are to be strictly construed; and the proceedings under them must conform in all respects to the requirements of the statute.

In what Cases.] It is provided by statute that any tenant or lessee at will, or at sufferance, or for any part of a year, or for one or more years, of any houses, land, or tenements, and the assigns, under-tenants, or legal representatives of such tenant or lessee, may be removed from such premises in the following cases:

1. Where such person shall hold over and continue in possession of the demised premises, or any part thereof, after

the expiration of his term, without the permission of the landlord;

2. Where such person shall hold over without such permission, as aforesaid, after any default in the payment of rent pursuant to the agreement under which such premises are held, and a demand of such rent shall have been made, or three days' notice in writing requiring the payment of such rent or the possession of the premises shall have been served by the person entitled to such rent, on the person owing the same, in the manner prescribed for the service of the summons in the thirty-second section of the statute, (*post*, *p.* 463);

3. Where the tenant or lessee of a term of three years or less shall have taken the benefit of any insolvent act, or been discharged under any act for the relief of his person from imprisonment during such term;

4. Where any person shall hold over and continue in possession of any real estate which shall have been sold by virtue of an execution against such person, after a title under such sale shall have been perfected. *Laws of* 1849, *p.* 291, *amending* 2 *R. S.* 512, *sec.* 28.(*a*)

Tenants from *year to year*, are included in the term "tenant at will," and may also be removed under this statute. 5 *How. Pr. R.* 81.

To warrant proceedings under the statute (except in the case mentioned in the fourth sub-division above, where land has been sold on execution), the conventional relation of landlord and tenant, created by agreement, and not by mere operation of law, must exist between the parties, or between those under whom they hold. 4 *Denio*, 185; 1 *Selden*, 383; 5 *Wend.* 281; 9 *Id.* 227; 10 *How. Pr. R.* 84. That relation exists between the lessee or his assignee, and the assignee or grantee of the lessor, provided there was a conventional relation between the original parties. 17 *Wend.* 473; 2 *R.*

(*a*) For the statutory provisions in relation to proceedings to obtain possession of lands deserted by a tenant, see 2 *R. S.* 512, *secs.* 24 *to* 27; and see, also, *Laws of* 1846, *p.* 369; 2 *Abb. Pr. R.* 121, 123.

S. 512, *sec.* 28, *supra.* But it does not necessarily exist in many cases, where the legal ownership is in one person and the possession in another, although by the express compact of the parties. It can arise only where the one in possession has by some act, or agreement, recognized the other as his lessor, or landlord, and taken upon himself the character of a tenant under him, so that he is not at liberty afterwards to dispute his title; and this statutory remedy in favor of a lessor or landlord, can properly be resorted to only in cases of a holding over after the expiration of such tenancy. If any other question than such as relates to the tenancy and the holding over, is to be litigated between the parties, recourse must be had to an action. 1 *Selden*, 388, per McCoun, J. An agreement, therefore, to work a farm on shares, does not create the relation of landlord and tenant, so as to entitle a party to avail himself of this statute. 15 *Wend.* 226; *and see Id.* 379; 1 *Hill*, 234. And so, of a conditional agreement, for the sale of real estate, where the purchaser makes default in payment, and, having possession, holds over, after notice and demand. 11 *How. Pr. R.* 84.

Nor can such proceedings be instituted on the ground of the expiration of the term by forfeiture; the statute meaning expiration by *lapse of time*, not by *forfeiture.* 15 *Wend.* 226; *and see* 5 *Selden*, 35, *post;* nor against a mortgagor to turn him out of possession of the mortgaged premises. 9 *Wend.* 227. And see further as to the creation of the estate of landlord and tenant, 15 *Wend.* 665; 3 *Hill*, 90; 1 *Denio*, 602.

The party instituting the proceeding must be entitled to the possession of the premises. Where such party is merely the owner of the reversion, expectant on the termination of the estate of the tenant for life, who is in the actual possession of the premises, he cannot institute proceedings against one to whom he has assumed to let the same. 3 *Barb. S. C. R.* 391.

And in cases of *non-payment of rent*, if the tenant at the time of the proceeding, is holding under a new agreement with the landlord, he cannot be dispossessed upon the ground

that he is in default in the payment of rent, under a former one. 16 *Barb.* 621. Nor can the tenant be removed where the landlord has done some act which amounts to an acknowledgment of a subsisting tenancy; as, if he receive rent due at a subsequent quarter, or distrain for that in respect of which the forfeiture accrued, &c. 21 *Wend.* 587; 5 *Cowen*, 448; 19 *Wend.* 391. And where the lease provided, that in case of the non-performance or violation of any of the lessee's covenants in the lease, the relation of landlord and tenant should cease at the option of the landlord, and that he should be entitled to recover the possession under the statute, for holding over after the expiration of the term, without any notice other than by the usual summons,—it was held that the clause in the lease created a condition only, and that the estate was not determined by the breach; and that, therefore, a default in the payment of rent did not constitute a holding over after the expiration of the term, so as to authorize proceedings under the statute, to recover the possession of the premises. The statute, not giving jurisdiction to remove a tenant by warrant in such a case, it cannot be given by the agreement of the parties. 5 *Selden*, 35.

In respect to proceedings to remove a person in possession, in cases arising under the fourth sub-division above, where *land has been sold on execution*, it has been held, that the judgment debtor, who continues in possession after title thereto has been perfected under a sale on execution against him, is a tenant within the meaning of that word, as used in the statute, and is entitled to deny the facts upon which the summons against him was issued, and to have a trial by jury. 16 *N. York R.* 567. And where the proceedings are before a justice of the peace, and the debtor appeals from the judgment rendered by the justice, he is also entitled to stay the issuing of a warrant to remove him, by giving the undertaking prescribed by section five of chapter one hundred and ninety-three, of the act of 1849 (*post*). *Ib.*

And the remedy given by the statute is not limited to the purchaser at the sale, but the application for process may be made by any person in whom the title is at the time of such application. 13 *Wend.* 29.

The regularity and validity of the judgment on which the execution issued, are not to be inquired into in this proceeding; nor whether the sale was fraudulent; nor whether the purchaser was a bona-fide purchaser. It is sufficient if the judgment and execution are regular upon their face, and the applicant shows a title under them. *Ib.* And the officer does not lose jurisdiction by proof that the person and estate of the defendant were, at the time the proceedings were instituted, in the charge of guardians appointed under the act respecting habitual drunkards. *Ib.* 32. And it is no objection, either, that the person proceeded against is a tenant in common whose interest has been sold; the purchaser acquires all his right and interest, and is entitled to be substituted in his place in the possession. *Ib.* 33.

The proceeding to dispossess a party where land has been sold on execution, is equally applicable against the judgment debtor, and all who hold under him, under pretense of title acquired subsequent to the judgment. 17 *Wend.* 474. And where a party is made defendant, who entered under title subsequent to the judgment, that fact must be distinctly alleged or the proceeding will be quashed. 20 *Id.* 22.

Officers who may Remove a Tenant.] The tenant or party in possession may be removed by any judge of the county courts of the county, or by any justice of the peace of the city or town, where the premises are situated, or by any mayor or recorder of the city where such premises are situated; or, in the city of New York, by the mayor, recorder, city judge, any justice of the Marine Court, or any one of the justices of the district courts of that city. *Laws of* 1849, *p.* 291, *sec.* 1; *Laws of* 1852, *p.* 471; *Laws of* 1857, *vol.* 1, *p.* 727; *Laws of* 1850, *p.* 388; 5 *Abb. Pr. R.* 208, 6 *Id.* 146. And also by any justice of the Superior Court of the city of Buffalo, when the premises are situated within that city, *Laws of* 1857, *vol.* 1, *p.* 754, *sec.* 25; and by the city judge of the city of Brooklyn, when the premises are situated within the county of Kings. *Laws of* 1849, *p.* 174, *sec.* 26.

Where the proceedings are commenced before a justice of

the district courts in the city of New York, they may be continued before any other justice, having jurisdiction of the subject-matter in that city, the same as if they had been originally commenced before him. *Laws of* 1857, *vol.* 1, *p.* 728, *sec.* 78. And so, where they are commenced before a justice of the Superior Court of the city of Buffalo, they may be continued, with the like effect, before any other justice of that court. *Ib.* 754, *sec.* 25.

Demand of Rent, or Notice to Pay, &c.] We have seen (*supra*), that in cases where the tenant is proceeded against for default in the payment of rent, the person entitled to the rent, before instituting the proceeding, is required, by the statute, to make a demand of the rent of the person owing the same, or serve him with three days' notice, in writing, requiring the payment of such rent, or the possession of the premises. For form of Notice, see *Appendix*, No. 303.

It is not necessary that there should be both a demand and notice. 14 *Wend.* 172.

The rent may be demanded of the tenant in possession; and so, too, it seems, the notice may be served on him, although he is not the lessee. *Ib.* And where two tenants hold jointly, a demand of the rent of one of them is sufficient. 5 *Selden*, 227.

It will be seen that the statute does not point out, how, or at what time, the demand of rent is to be made; whether it may be made at any time after the rent becomes due, and at any place, or whether, the object of the landlord being a forfeiture of the estate and his claim *stricti juris*, all the niceties of the common law with respect to the demand must be complied with. *See* 16 *Johns.* 222; 17 *Id.* 66; 18 *Id.* 447. But the statute requires only, that "a demand of the rent shall have been made." Substantially the same language is used in the act of 1820. *Laws of* 1820, *p.* 177, *sec.* 1. Statutes are not presumed to make any alteration in the common law further or otherwise than the act expressly declares; and, therefore, in all general matters the law presumes the act did not intend to make any alteration, for if the legislature

had had that design, they would have expressed it in terms. Per Trevor, Ch. J., 11 *Mod.* 150; *Bac. Abr. Statutes;* 16 *Barb.* 12. If, then, the statute intended a common-law demand of the rent, great particularity and strictness is required in making it. It must be of the precise rent due. It must be made on the very day when the rent is due and payable, and at a convenient time before sunset. It must be made on the land, and at the most notorious place of it, unless a place is appointed where the rent is payable. And a demand must be made in fact, although there should be no person on the land ready to pay it. 17 *Johns.* 71.

In the absence of any reported case giving a construction to this language of the statute, it would be safer, in all cases, where there has not been a strict common-law demand, to give the three days' notice in writing, requiring the payment of the rent or the possession of the premises. This notice is required to be served in the same manner prescribed for the service of the summons; in respect to which, see post, p. 463, "How summons to be served."

Affidavit of termination of Tenancy; Demand of Possession, &c.] Previous to the issuing of the summons hereinafter mentioned, in the case of a tenancy at will, or at sufferance, the magistrate shall be satisfied by affidavit, that such tenancy has been terminated by giving notice in the manner prescribed by law. See *post*, "Notice to quit," &c. And if application be made for such summons to be served on any person holding over real estate which shall have been sold on execution, the magistrate shall, in like manner, be satisfied that a demand of the possession of such premises has been made. 2 *R. S.* 513, *sec.* 31. For forms, see *Appendix*, Nos. 305, 306.

Notice to quit, and how Served.] Wherever there is a tenancy at will, or by sufferance, created by the tenant's holding over his term, or otherwise, the same may be terminated by the landlord's giving one month's notice in writing to the tenant, requiring him to remove therefrom. 1 *R. S.* 745, *sec.* 7. For form, see *Appendix*, No. 304.

Such notice shall be served by delivering the same to such

tenant, or to some person of proper age residing on the premises; or if the tenant cannot be found, and there be no such person residing on the premises, such notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read. *Ib. sec.* 8. At the expiration of one month from the service of such notice, the landlord may proceed in the manner prescribed by the statute, to remove such tenant, without any further or other notice to quit. *Ib. sec.* 9.

Where the notice required the tenant to remove from the premises in "thirty days," and it was served during a calendar month which contained but thirty days; it was held to be a "month's notice," within the meaning of the statute. 2 *Abb. Pr. R.* 28.

A tenant for a year who holds over after the expiration of his term, without the permission of his landlord, is not a tenant *at sufferance*, within the meaning of the statute; and, therefore, he may be removed from the demised premises, without having been served with the month's notice to quit above provided for. To entitle such tenant to a month's notice to quit, the holding over must be continued for such length of time, after the expiration of the term, as to authorize the implication of assent on the part of the landlord to such continuance; and where the landlord waited three months and twelve days before instituting proceedings, under the statute, it was held that he was not chargeable with laches, especially as it appeared that he had attempted to obtain possession without recourse to coercive measures. 11 *Wend.* 616.

Tenants from *year to year*, at the common law, were entitled to six months' notice to quit terminating with the year. 4 *Cow.* 349; 1 *Johns.* 325. But, now, tenants from year to year, with respect to these proceedings, are included in the term "tenant at will," within the meaning of the statute, and may be summarily removed upon *one month's* notice to quit, terminating with the year. 5 *How. Pr. R.* 81. And so of a tenancy from month to month: the notice must terminate with the month. *Ib.* 92; *see, also*, 23 *Wend.* 616.

Where the landlord after service of notice to quit accepted

rent, which accrued subsequent to the notice, it was held to be a waiver of the notice. 19 *Wend.* 391. It would have been otherwise, it seems, had the acceptance been stated as conditional, and as saving and reserving all rights under the notice. *Ib.* 394; *see also*, 11 *Barb.* 33; 21 *Wend.* 587.

Where the premises on the 1st of September, 1837, were demised to the defendant "for and during the will and pleasure of the plaintiff," and the plaintiff on the 12th February, 1852, caused notice to be served on the tenant, requiring him to remove from and quit the premises within one month after the service of such notice,—it was held to be strictly a case of tenancy at will, within the meaning of the statute; and that the landlord had a right to give the month's notice to quit at any time, and commence proceedings to remove the tenant after the expiration of the notice. 14 *Barb.* 253. And under the act of 1820, from which the present statute was taken, where there was proof of a tenancy, and nothing appeared as to the terms of holding, it was presumed to be a tenancy at will. 8 *Cowen*, 13.

Affidavit to Remove Tenant.] In preparing the affidavit upon which to found an application for a warrant to remove a tenant, or party in possession, great particularity is required, and every fact necessary to give the officer jurisdiction must be distinctly alleged. 20 *Wend.* 22. And unless this be done, the proceeding will not only be declared void, but if a warrant be issued and executed, the landlord as well as the officer issuing the same, will be a trespasser, and liable in damages to the party injured, 8 *Cowen*, 68; and this, too, it seems, notwithstanding that the person dispossessed came illegally into possession. 5 *Wend.* 281.

The affidavit must not be uncertain, or contradictory; but must make out a plain case. 16 *Barb.* 474; 24 *Id.* 438; 6 *Hill*, 314; 5 *How. Pr. R.* 95. The facts, and not the evidence of facts, should be alleged,—nor should matter of law be stated, but facts, from which the matter of law arises. 6 *Hill*, 317, per Bronson, J. The affidavit is not to be regarded as evidence on the merits, but as a plaint in a cause,

and stands for a declaration, or complaint. 20 *Wend.* 103. For forms, see *Appendix*, Nos. 307 to 310.

The provisions of the statute with respect to the requisites of the affidavit to be made, are as follows:—Any landlord, or lessor, his legal representatives, agents, or assigns, may make oath in writing of the facts which, according to the preceding section (*sec.* 1, *Laws of* 1849, *supra*), authorize the removal of a tenant, describing therein the premises claimed; and may present the same to one of the officers authorized by law to issue the warrant. 2 *R. S.* 513, *sec.* 29.

Among other things, it must appear by the affidavit that the plaintiff let the premises to the defendant, or that he is the landlord of the defendant with respect to the premises of which the possession is sought to be recovered; and also that the plaintiff was the owner of the premises, or entitled to the possession thereof, at the time of his demise to the defendant. 3 *Barb. S. C. R.* 391; *and see* 1 *How. Pr. R.* 213. But, it is sufficient if these facts are substantially alleged. 2 *Abb. Pr. R.* 29, per Mitchell, J.

Where the proceedings were instituted by S., and the affidavit stated that J. demised the premises, &c.; that he afterwards died leaving S. his widow, that she became legally entitled to receive the accruing rents, and to have possession of the premises, without setting forth any fact explaining how she became entitled,—it was held that the affidavit was not sufficient to show her right to proceed. 6 *Hill*, 314. And this is so, even though the affidavit state further that the tenant and those claiming under him "have recognized the widow's right to the premises, by paying rent to her and by other acts." *Ib.* In another case, however, where the landlord described himself "as trustee of the estate of A. B., deceased," that he "now owns said premises and holds said lease, as sole trustee of said estate," the court held it was a sufficient description as landlord of the premises. 2 *How. Pr. R.* 63.

The affidavit should point out, too, the person intended to be removed, by *name*, and should show with reasonable certainty that he is in the possession or occupation of the

premises, together with his relation to the landlord. 6 *Hill*, 314; *Lal. Supp. to Hill & Denio*, 236; 24 *Barb.* 438. Where the affidavit stated that W. (the lessee), "or his assigns, or those claiming under him or them," held over, and it appeared that W. was not in possession, but that the premises were occupied by H., it was held that the affidavit was insufficient to give the officer jurisdiction. *Id. ibid.; and see* 14 *Wend.* 172. And where the proceedings are against several parties, the affidavit should show which of the persons proceeded against are tenants, and which of them are under-tenants. 16 *Barb.* 474; *Lal. Supp. to Hill & Denio*, 236.

If the affidavit is made by the agent of the landlord, it is not sufficient that he describes himself as agent, but that fact must be distinctly sworn to. 4 *Denio*, 71.

And where the affidavit omits to state that the tenant is holding over, "without the permission of his landlord," it is error, for which the proceedings will be reversed, 5 *How. Pr. R.* 81; and it is not enough that the affidavit shows probable want of permission. *Ib.* 95; but see 20 *Wend.* 103.

In proceeding under the statute against a tenant for the *non-payment of rent*, it is laid down by Cowen, J. (20 *Wend.* 107), that the affidavit should disclose an agreement by which the lessors were entitled to re-enter. But it is believed that the position there taken is not sustained by the letter or spirit of the statute. It is sufficient if there has been a default in the payment of the rent, pursuant to the agreement under which the premises are held, and that a demand of the rent has been made, or notice served, requiring payment or the possession of the premises. *Laws of* 1849, *p.* 291, *sec.* 1, *sub.* 2.

The affidavit in cases of non-payment of rent should name the person of whom the rent was demanded; but though defective in this particular, if it states that the demand was made upon the premises, it is sufficient to give the officer jurisdiction, and the defect cannot be objected to collaterally: the remedy, if any, is by certiorari or appeal. 14 *Wend.* 172.

In cases where real estate has been *sold on execution*, and the party proceeded against is one who has come into possession of the land under the judgment debtor, under title derived from him subsequently to the lien of the judgment under which the sale was made, the fact that he entered under title so subsequently acquired, must be distinctly alleged in the affidavit, or the proceedings will be void. 20 *Wend.* 22.

The affidavit cannot be twice used. Accordingly, where a verdict was found for the tenant under the statute authorizing these proceedings, it was held that the original affidavit could not be used as the foundation of a new proceeding. And the affidavit, having been so used, and the tenant turned out of possession, it was further held that the proceedings were void, and that trespass lay against both the landlord and judge. 8 *Cowen*, 68.

The Summons.] On receiving the affidavit the officer is required to issue his summons, describing the premises of which the possession is claimed, and requiring any person in the possession of said premises, or claiming the possession thereof, forthwith to remove from the same, or to show cause, before the said magistrate, within such time as shall appear reasonable, not less than three nor more than five days, why possession of said premises should not be delivered to such applicant; provided, however, that in the cases where a person continues in possession of the demised premises after the expiration of his term, without permission of his landlord, —the magistrate may direct such summons to be made returnable on the same day. 2 *R. S.* 513, *sec.* 30, *as amended by Laws of* 1851, *p.* 852; and see 24 *Barb.* 438.

The summons must be directed to the tenant or occupant by name; and where the direction was left in blank, the proceedings were held to be defective, though service was made upon the proper party. 4 *Denio*, 71; *Ib.* 185; 6 *Hill*, 314; 24 *Barb.* 438. And an appearance by the defendant, for the purpose of objecting to the summons, is not a waiver of the defect. 4 *Denio*, 71. But where the proceeding was

instituted against two, both of whom were named in the affidavit, and the summons was directed to one of them, "and any other person in possession of the premises," and both appeared before the officer, made affidavit, and had a trial by jury, without objecting to the summons,—it was held that it was sufficient. 4 *Denio*, 185. For form of summons, see *Appendix*, No. 311.

How Summons to be Served.] The summons must be served, either,—

1. By delivering to the tenant to whom it shall be directed, a true copy thereof, and, at the same time, showing him the original; or,

2. If such tenant be absent from his last or usual place of residence, by leaving a copy thereof at such place, with some person of mature age, residing on the premises, 2 *R. S.* 514, *sec.* 32; or, if there be no such person residing thereon, then such service may be made by affixing such copy upon a conspicuous part of said demised premises. *Laws of* 1857, *vol.* ii. *p.* 509, *sec.* 1.

The summons may be served by any person competent to testify as a witness, and who is not a party to the proceeding. Proof of such service should be made by affidavit. For form, see *Appendix*, No. 312.

Where the summons was served by copy, and the only proof of such service was that the tenant was absent, and that the copy was left with R., residing on the premises,—it was held that the proof was insufficient, as not showing the tenant's absence from "his last or usual place of residence," or that the copy was left with a "person of mature age." 1 *Hill*, 512.

If the summons is directed to the original lessee, but served only upon an under-tenant in possession, the service is insufficient: it should be served upon both. 1 *How. Pr. R.* 213.

What the Defendant to do in certain cases.] If the defendant holds the premises by lease or agreement from any

other party than the plaintiff mentioned in the affidavit or summons, he must forthwith give notice of the service upon him of such summons, to his immediate landlord. And this he is required to do, under a penalty of forfeiting the value of three years' rent of the premises so occupied by him; which may be sued for and recovered by the landlord or person of whom such tenant holds. 1 *R. S.* 748, *sec.* 27.

If the Tenant do not defend, Warrant to issue.] If at the time appointed in the summons, no sufficient cause be shown to the contrary, and due proof of the service of the summons be made to such magistrate, he is required thereupon to issue his warrant to the sheriff of the county, or to any constable or marshal of the city or town, where the premises are situated, commanding him to remove all persons from the premises, and to putthe applicant into the full possession thereof. 2 *R. S.* 514, *sec.* 33. For form, see *Appendix*, No. 313.

The officer to whom the warrant for delivering the possession of the premises shall be directed and delivered, is required to execute the same according to the tenor thereof. *Id.* 515, *sec.* 40.

The Issue.] Any person in possession of the demised premises, or any person claiming the possession thereof, may, at the time appointed in such summons for showing cause, file an affidavit with the magistrate who issued the same, denying the facts upon which the summons was issued, or any of those facts. 2 *R. S.* 514, *sec.* 34, *as amended by Laws of* 1857, *vol.* 2, *p.* 509, *sec.* 2; and for previous amendment, see *Laws of* 1849, *p.* 292. For form of affidavit, see *Appendix*, No. 314.

The denial in the defendant's affidavit should be express and positive, and not circumstantial and argumentative; no possibility of evasion should exist. 25 *Wend.* 284. Allegations in the landlord's affidavit, not denied by the defendant, will be taken as true. 2 *Abb. Pr. R.* 29.

Where the proceeding was against the tenant after default in the payment of rent, and the tenant in his affidavit stated that the landlord had before commenced a similar proceeding

for the non-payment of the same rent, and that the parties appeared, and after their proofs and allegations were heard, the magistrate gave judgment for the tenant; it was held that the affidavit was insufficient, as it did not show what issue, or whether any, was joined, or upon what ground the judgment proceeded. 5 *Selden*, 227. And where two tenants were jointly charged in the affidavit of the landlord, an affidavit by one of the defendants that the rent was not demanded of *him*, is not sufficient to make an issue requiring the summoning of a jury. *Ib.;* see also *post*, *p.* 467. "What the defendant may show."

How the Issue to be Tried.] If the defendant appears and denies the facts alleged in the landlord's affidavit, or any of them, the matters, thus controverted, are to be tried by the magistrate, or by a jury; provided either party to such proceedings, shall, at the time designated in the summons for showing cause, demand a jury, and at the time of such demand pay to the magistrate the necessary costs and expenses of obtaining such jury. (*a*) 2 *R. S.* 514, *sec.* 34, *as amended by Laws of* 1857, *vol.* 2, *p.* 509, *sec.* 2. For previous amendment, see *Laws of* 1849, *p.* 292, *sec.* 2.

The necessary costs and expenses of obtaining the jury are, the magistrate's fees for the venire, the sheriff's or constable's fees for the service thereof, and the fees of the jury.

Adjournments.] Any magistrate before whom the application may be pending, may, upon the request of either party, adjourn the hearing of such application, for the purpose of enabling such party to procure his witnesses, whenever it shall appear to be necessary; such adjournment, however, shall in no case exceed ten days. 2 *R. S.* 515, *sec.* 41.

(*a*) It was held by M'Coun, J., prior to the recent amendment of this section (1 *Selden*, 385), where the proceedings were before a county judge, and the defendant had appeared and denied the facts alleged in the landlord's affidavit, that the judge had no authority to try the issue, thus joined, without a jury. But it will be seen by the section as amended, that the power to try, in such case, is now given to him.

Subpœnas for Witnesses.] The magistrate may, also, at the request of either party, issue his subpœna, requiring any person to appear and testify before such magistrate, or before the jury, touching the matters directed by law to be heard by them; and every person who, being served with such subpœna, shall, without reasonable cause, refuse or neglect to appear; or, appearing, shall refuse to answer upon oath, touching the matters aforesaid; shall be subject to the proceedings and penalties provided by law in similar cases. 2 *R. S.* 515, *sec.* 42.

The Jury, and their Proceedings.] In order to form the jury, the magistrate with whom the affidavit is filed, is required to nominate twelve reputable persons, qualified to serve as jurors in courts of record (2 *R. S.* 411, *sec.* 13), and to issue his precept, directed to the sheriff or to one of the constables of the county, or any constable or marshal of the city or town, commanding him to summon the persons so nominated, to appear before such magistrate at such time and place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matters in difference. 2 *R. S.* 514, *sec.* 35, *as amended by Laws of* 1849, *p.* 292. For form of precept, see *Appendix*, No. 315.

Six of the persons so summoned shall be drawn in like manner as jurors in justice's courts (2 *R. S.* 243, *sec.* 98, *&c.*), and shall be sworn by such magistrate well and truly to hear, try, and determine, the matters in difference between the parties. 2 *R. S.* 514, *sec.* 36, *as amended by Laws of* 1849, *p.* 292.

It would be erroneous for the magistrate to nominate more than twelve jurors, especially if the tenant object to the proceeding. 20 *Wend.* 207. If there be a default of jurors on the return of a venire, the magistrate is authorized to renew the venire until a jury appears. 9 *Wend.* 227. And so, also, if some of the jurors are disqualified. 7 *How. Pr. R.* 441.

After hearing the allegations and proofs of the parties, the jury are to be kept together until they agree on their ver-

dict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the magistrate for that purpose, who shall be sworn to keep such jury as is usual in like cases in courts of record. 2 *R. S.* 514, *sec.* 37. If the jury cannot agree, after being kept together for such time as the magistrate shall deem reasonable, he may discharge them, and nominate a new jury, and issue a new precept in manner aforesaid. *Ib. sec.* 38.

What the Defendant may Show.] We have seen (*supra*) that the defendant may answer to the affidavit of the landlord, by filing an affidavit with the magistrate, denying the facts upon which the summons issued, or any of those facts. 2 *R. S.* 514, *sec.* 34; *and see ante, p.* 464, "The Issue." Anything, therefore, which would tend to disprove those facts, or any of them, would be proper for the defendant to show in defense. He would not, however, be permitted to set up title to the premises acquired by him from a third party since the taking of his lease 11 *Wend.* 616. But though the tenant cannot deny his landlord's title, yet, no doubt, in analogy to the rule which prevails in actions to recover the possession of real estate, he may show that the landlord's title has terminated either by its own limitation, or by conveyance, or by operation of law. 5 *Cowen*, 124; 11 *Wend.* 621; 3 *Barb. S. C. R.* 402; 3 *Sand. S. C. R.* 664, per Mason, J.; see also 6 *Wend.* 666; 22 *Id.* 121; 1 *Sand. S. C. R.* 517; 15 *New York R.* 377; 16 *Id.* 573.

In cases arising under the fourth subdivision of the statute, where land has been sold on execution, the defendant will not be permitted to inquire into the regularity and validity of the judgment, on which the execution issued; nor whether the sale was fraudulent; nor whether the purchaser purchased in good faith; but it will be sufficient if the judgment and execution are regular upon their face, and the plaintiff shows a title under them. 13 *Wend.* 29.

Examination of Parties on the Trial.] The second part of the Code of Procedure does not apply to these proceedings;

and, therefore, it seems, the parties cannot be sworn and examined, in their own behalf, under the provisions of the Code (§ 399, *&c.*), notwithstanding that those provisions authorize such examination in special proceedings of a summary nature. *See Code* § 471; 1 *Park. Cr. R.* 169; 2 *Brad.* 224; 16 *Barb.* 201; 1 *Selden*, 383; 3 *Sand. S. C. R.* 665; 10 *How. Pr. R.* 83; 5 *Abb. Pr. R.* 212.

Proceedings, when before a Justice of the Peace.] In case of proceedings before a justice of the peace, the justice shall enter the finding of the jury, or in case no jury is called, his final decision upon the application for the warrant, in his docket, and render judgment therefor, and include in such judgment, costs of such proceedings to the prevailing party at the same rate of fees now allowed by law in civil actions in courts of justices of the peace, and limited in like manner; and in the warrant for delivery of possession, or by execution, issued by him, the justice shall direct the collection of such costs. *Laws of* 1849, *p.* 292, *sec.* 5, *sub.* 1.

Warrant of Possession.] If the decision of the magistrate, or the verdict of the jury, shall be in favor of the lessor, or landlord, or other person, claiming the possession of the premises, the magistrate shall issue his warrant to the sheriff, or to any constable of the county in which the premises are situated, commanding such officer to put the landlord, lessor, or other person, into the full possession of the premises. 2 *R. S.* 515, *sec.* 39, *as amended by Laws of* 1857, *ch.* 684, *sec.* 3. For form, see *Appendix*, No. 316.

The officer to whom the warrant for delivering the possession of the premises shall be directed and delivered, is required to execute the same according to the tenor thereof. 2 *R. S.* 515, *sec.* 40.

Effect of Issuing Warrant.] The statute provides that where a warrant shall be issued for the removal of any tenant from any demised premises, the contract or agreement for the use of the premises, if any such exists, and the relation of

landlord and tenant between the parties, shall be deemed to be canceled and annuled. 2 *R. S.* 515, *sec.* 43.

Though the tenant has been removed from the demised premises for non-payment of rent, yet the landlord may recover the same by action. And he may recover all the rent due up to the time of issuing the warrant. 6 *Hill*, 507; 3 *Denio*, 452; 4 *Coms.* 270. But it seems that compensation for the use of the premises by the tenant intermediate the default and the time he is dispossessed, cannot be recovered by action on the lease; but the landlord's remedy is by proceeding against the tenant as a trespasser. *Id. ibid.; and see* 1 *Wend.* 134.

Where the rent was payable quarterly, in advance, it was held that an eviction during the quarter, but after the rent became due, did not bar an action for the rent. The most the evicted tenant could equitably claim, in such case, was a deduction for so much of the quarter as elapsed after his eviction. 1 *Duer*, 266; 4 *Coms.* 270; *and see* 1 *E. D. Smith*, 416; 2 *Id.* 121.

When, and in what Cases, the Proceeding will be Stayed.] The statute authorizes the proceedings to be stayed before warrant issued, except where the tenant holds over after the expiration of his term.

It provides that the issuing of the warrant of removal shall be stayed in case of *a proceeding for the non-payment of rent*, if the person owing such rent, shall, before such warrant be actually issued, pay the rent due, and all the costs and charges of the proceedings; or give such security as shall be satisfactory to the magistrate, to the person entitled to the rent, for the payment thereof and the costs aforesaid, in ten days. But in case the person giving such security shall not within the said ten days produce to the magistrate satisfactory evidence of the payment of the rent and costs, the warrant of removal may at any time thereafter be issued. 2 *R. S.* 515, *sec.* 44, *as amended by Laws of* 1857, *vol.* 2, *p.* 509, *sec.* 4. For form of security, see *Appendix*, No. 317.

Where the application is founded on the fact that the

tenant or lessee has taken the *benefit of any insolvent act*, or been *discharged* under any act for the relief of his person *from imprisonment*, the proceedings will be stayed, if at any time before issuing the warrant for removal, the tenant or lessee, or his assignee, shall pay the costs of such proceedings as have been had, and give such security to the person entitled to the rent, for the payment thereof as it shall become due, as shall be satisfactory to the magistrate. 2 *R. S.* 515, *sec.* 45. For form, see *Appendix*, No. 318.

And when the application is founded upon an alleged *sale by execution* of the premises occupied by the defendant in such execution, the proceedings shall be stayed, if at any time before issuing the warrant of removal, the occupant shall,

1. Pay the costs of such proceedings;

2. File with the officer before whom the application is pending, an affidavit that he claims the possession of such premises by virtue of some title or right acquired after such premises were sold, or as guardian or trustee for any other; and,

3. Execute a bond to the applicant for such warrant, in such penalty and with such sureties as the magistrate shall approve, conditioned to pay the costs which may be recovered against him in any ejectment that may be brought by such applicant within six months, for the recovery of the possession of such premises; and to pay the value of the use and occupation of such premises, from the date of such bond to the time such applicant shall obtain possession of the same by virtue of a recovery in such action of ejectment; and also conditioned not to commit any waste or injury to such premises, during his occupation thereof. *Ib. sec.* 46. For forms of affidavit and bond, see *Appendix*, Nos. 319, 320.

See further on this subject, *post*, *p.* 475. "Stay of Proceedings on Certiorari."

Redeeming the Premises in certain Cases.] In case of proceedings against the tenant for default in the payment of rent, if the unexpired term of the lease under which the premises are held exceeds five years, at the time of issuing

the warrant upon such proceedings, the lessee, his assigns or personal representatives, may, at any time within one year after possession of the demised premises shall have been delivered to the landlord, pay or tender to the lessor, his representatives or attorney, or to the officer who issued the warrant, all rent in arrear to the time of such payment or tender, and all costs and charges incurred by the landlord; and in such case the premises shall be restored to the lessee, who shall hold and enjoy the same without any new lease thereof, according to the terms of the original demise; and any mortgagee of the lease, or of any part thereof, who shall not be in possession of the demised premises, or any judgment creditor of the lessee who shall, within one year after the execution of such warrant, pay all rent in arrear, all costs and charges as aforesaid, and perform all the agreements which ought to be performed by the first lessee, shall not be affected by such recovery; and such judgment creditor may file a suggestion of such payment upon the record, and may issue execution for the amount of the original judgment and of such payment. *Laws of* 1842, *p.* 293.

Appeal to the County Court.] If the proceedings are before *a justice of the peace*, either party may have the same reviewed on appeal to the county court, or a writ of certiorari may be awarded by the Supreme Court, for the purpose of examining any adjudication made in such proceedings; the remedy by appeal and by certiorari, in such case, being concurrent. 11 *How. Pr. R.* 83; and see *post*, "Certiorari to remove proceedings."

But an appeal does not lie from the decision of a justice of one of the district courts of the city of New York, to the Court of Common Pleas of that city. The only mode of review, in such case, is by certiorari, issuing out of the Supreme Court. 5 *Abb. Pr. R.* 205; but see *contra*, *Id.* 61.

In respect to appeals from the decision of a justice of the peace, it is provided by statute, that proceedings before a justice of the peace, may be removed by appeal to the county court of the county, in the same manner, and with the like

effect, and upon like security, as appeals from the judgment of justices of the peace in civil actions, except that the decision of such county judge shall be an affirmance or reversal of such judgment, and be final. But in addition to the security for such judgment as required by law, in case of such appeal, in order to stay the issuing of such warrant or execution, there shall, in case of appeal by the tenant, be security also given for the payment of all rent accruing or to accrue upon such premises subsequent to the said application to such justice. *Laws of* 1849, *p.* 292, *sec.* 5, *sub.* 2.

The statute further provides that no appeal will be allowed unless the security for said judgment shall be given, and approved by the judge at the time of allowing such appeal, and served on the justice with the affidavit for appeal. *Ib. sub.* 3.

The practice on appeals to the county court, in these proceedings, has been somewhat modified by subsequent statutory provisions.

Thus, under the present practice, no affidavit is necessary to be served on the justice in order to perfect the appeal; nor is it necessary that the appeal should be allowed by a judge of the appellate court, or other officer. See 24 *Barb.* 438.

The appeal is now brought by the service, within twenty days after judgment, of a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment, however, was rendered upon process not personally served, and the defendant did not appear, he has twenty days, after personal notice of the judgment to serve the notice of appeal. *Ib.; Code of Pro.* § 353. For form of notice, see *Appendix*, No. 321.

The notice of appeal must also, within the same time, be served on the justice, personally, if living and within the county, or on his clerk, if there be one, and on the respondent personally, or by leaving it at his residence, with some person of suitable age and discretion, or, in case the respondent is not a resident of such county, or cannot after due diligence be found therein, in the same manner on the

attorney or agent, if any, who is a resident of such county, who appeared for the respondent on the trial; and if neither the respondent nor such agent or attorney can be found in the county, the notice may be served on the respondent by leaving it with the clerk of the appellate court, and the appellant must, at the time of the service of the notice of appeal on the justice, or on his clerk, as herein provided, pay to such justice or clerk the costs of the proceeding included in the judgment, together with two dollars costs of the return, which shall be included in the judgment for costs on reversal. *Ib.* § 354; and see 24 *Barb. supra.*

In order to perfect the appeal, security must be given the same as on appeals in actions in cases where the appellant desires a stay of execution. *Ib.;* and see 10 *How. Pr. R.* 87.

The security is a written undertaking, executed by one or more sufficient sureties, to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied. *Code,* § 356. For form, see *Appendix,* No. 322. And it seems, the security must be approved by the county judge, or by a justice of the Supreme Court. 24 *Barb.* 442, *supra.*

In addition to the security on the judgment, in case of an appeal by the tenant, in order to stay the issuing of the warrant or execution, security must also be given, as we have seen, for the payment of all rent accruing, or to accrue, upon the premises, subsequent to the application to the justice. *Ib.;* and see *Laws of* 1849, *supra.* For form, see *Appendix,* No. 322. And the judgment debtor, whose land has been sold on execution, and who holds over and continues in possession of the premises after title thereto has been perfected under the sale, is a "tenant" within the meaning of the statute. 16 *New York R.* 568, 574. And the word "rent," above mentioned, where the proceeding is between such debtor and the purchaser of his land, on execution, means compensation for the use and occupation of the premises, subsequent to the commencement of the proceedings. *Ib.*

No appeal lies from the judgment of the county court to

the Supreme Court. The judgment is final, in the sense of being ultimate and conclusive; at least, so far as an appeal to the Supreme Court is concerned. 24 *Barb.* 438, *supra.*

The proceedings upon the appeal, subsequent to notice of appeal, security, &c., are substantially the same as on appeals in actions.

If the tenant fails to appear on the return of the summons, before the justice, he will thereby admit the rights of the landlord; and will be precluded, on the appeal, from objecting to irregularity in the proceedings. 2 *Abb. Pr. R.* 28.

Where judgment is rendered against the tenant, and he is turned out of possession of the premises, and, on appeal, the judgment is reversed, the court has no power to restore him to the possession of which he has been deprived by the erroneous judgment. 10 *How. Pr. R.* 83. If the tenant desires to retain possession in such case, he must give security for the payment of the rent. *Ib.*

Certiorari to Remove Proceedings.] The Supreme Court is authorized to award a certiorari for the purpose of examining any adjudication made on any application authorized by the statute; but the proceedings on any such application shall not be stayed or suspended by such writ of certiorari, or any other writ, or order of any court or officer. 2 *R. S.* 516, *sec.* 47; 9 *Wend.* 228. For form of writ, see *Appendix*, No. 323.

It was formerly held that on the return to a certiorari, under the above section, no other questions could be raised than those relating to the *jurisdiction* of the officer before whom the proceedings were had, and to the *regularity* of such proceedings. 17 *Wend.* 464; 19 *Id.* 391; 20 *Id.* 103, 189. But it seems, now, to be fully settled, that the authority of the court is not limited in such case to questions of jurisdiction and regularity; but that the court has power, also, to examine upon the merits every decision of the judge, *a quo*, upon a question of law, and to look into the evidence, and affirm, reverse, or quash the proceedings as justice should require. And the court will direct the return of such parts

of the proceedings as are material to the examination of the case upon its merits. 23 *Wend.* 616; 25 *Id.* 280; 1 *Selden*, 383; 2 *Id.* 309; 3 *Barb. S. C. R.* 391; 7 *How. Pr. R.* 154.

In the return to the certiorari, it should affirmatively appear that the statute has been strictly pursued, in the proceedings before the magistrate. 26 *Wend.* 207. But the tenant will be precluded from objecting to irregularity in the proceedings, on certiorari, where he has failed to appear before the magistrate on the return of the summons. 2 *Abb. Pr. R.* 28.

A party who has no interest in the subject-matter of the proceedings, cannot have the writ. 12 *Wend.* 234.

The court will not reverse the judgment as to part of the defendants and affirm it as to the rest. *See* 5 *Selden*, 227. If it is irregular as to one, it is irregular as to all of them, *Ib.; and see Lal. Supp. to Hill & Denio*, 236; though where the Supreme Court reversed the proceedings as to part of the defendants and affirmed them as to others, the error was held not available on appeal to the Court of Appeals, brought by those against whom judgment was rightfully pronounced in the Supreme Court. 5 *Selden*, 227, *supra.*

The certiorari may be brought to a hearing by either party upon the usual notice of argument; and is entitled to preference, on the morning of any day during the first week of term. *Sup. Court Rules*, 1858, *No.* 47.

Stay of Proceedings on the Certiorari.] In respect to the second branch of the 47th section (*supra*), declaring that "the proceedings on any such application shall not be stayed or suspended by such writ of certiorari, or any other writ or order of any court or officer," it was held by Edmonds, J. (1 *Barb. S. C. R.* 65), that that provision operated as a prohibition to a court of equity to stay the landlord's proceedings on the application to remove his tenant. But afterwards, the same justice held that the statute, being inconsistent with the provisions of the Code of Procedure (§ 219), which authorizes an injunction in any case where the act complained

of would "produce injury to the plaintiff," was repealed (§§ 468, 471); and accordingly he denied a motion to dissolve an injunction restraining the landlord's proceedings. *Cure* vs. *Crawford*, 5 *How. Pr. R.* 293; *s. c.* 1 *Code R., N. S.* 18. See also to the same effect, 3 *Sand. S. C. R.* 662; 1 *Duer*, 624. But see *contra*, *Wordsworth* vs. *Lyon*, 5 *How. Pr. R.* 463; *s. c.* 1 *Code R., N. S.* 163, per Barculo, J., where the decision of Justice Edmonds in *Cure* vs. *Crawford* is disapproved; and where it is held that to authorize the issuing of an injunction under § 219 it must appear that the plaintiff is entitled to the final relief demanded according to other or pre-existing laws, independently of the Code.

And so, in *Hyatt* vs. *Burr* (8 *How. Pr. R.* 168), in the Supreme Court, first district, at special term,—it was held, that by the true construction of the Code, an injunction cannot be granted to stay or suspend proceedings under the statute for the recovery, by summary proceedings, of the possession of premises. And, per Roosevelt, J., in a note at p. 170, "I have consulted on this subject with two of my colleagues with the view of establishing a uniformity of practice on a point so important to the community, as well as the profession—and they concur with me in saying that by the true construction of the Code, an injunction cannot be granted to stay or suspend proceedings under the statute for recovering summary possession of houses or lands." And see 6 *How. Pr. R.* 164. (*a*)

But it seems that even if the statute applies to injunctions out of courts of equity, as well as to proceedings at law, yet

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(*a*) The Revisers, in their original note to the 47th section, say, it is "conformable to 20 Johnson's R. 80." That case merely decides, that the writ of certiorari will not lie to remove the proceedings until the magistrate has finally adjudicated upon them; and that even then, the certiorari will not stay the writ of restitution or possession. Taking the whole of the section together, in connection with the note of the Revisers, it is doubtful whether it was intended by the section to do more than to declare that the proceedings before the magistrate should, in no case whatever, *on account of the certiorari*, be stayed or suspended,—thus leaving the court to exercise its equitable power to restrain by injunction in all proper cases, unaffected by the statute.

it can only affect cases in which the magistrate has jurisdiction, and not where, by the admission of the person assuming to be landlord, he has no jurisdiction. 3 *Sand. S. C. R.* 665, per Mason, J.; *s. c.* 1 *Code R., N. S.* 90. Nor would the statute prevent a court of equity from relieving the tenant in case of fraud or surprise. *James* vs. *Stuyvesant*, 3 *Sand., supra, note;* 1 *Duer*, 624; 16 *How. Pr. R.* 170; nor, it seems, where he is without an adequate remedy at the common law. 2 *Abb. Pr. R.* 125, per Clerke, J.

But the certiorari, notwithstanding the statute, suspends the effect of the judgment of the magistrate in everything except what remains to be done by the magistrate himself. The magistrate may issue his warrant to dispossess the tenant; but during the pendency of the writ of certiorari, his judgment is no evidence that the tenancy has ceased, or of a right to re-enter. And after the writ is issued, and while it is pending, the landlord cannot maintain an action for the costs of the proceedings, nor for rent accruing intermediate the forfeiture and the issuing of the warrant. 5 *Sand. S. C. R.* 249.

As to the cases where the proceedings are authorized by the statute to be stayed, see *ante, p.* 469.

Appeal to the Court of Appeals.] After the decision of the Supreme Court upon the certiorari, either party may have the same reviewed on appeal to the Court of Appeals. This review was formerly had by writ of error; but an appeal under the Code of Procedure is now the appropriate remedy —the provisions of which relating to appeals to the Court of Appeals, apply to appeals in these proceedings, so far as the same are applicable. *Code of Pro.* §§ 8, 11, 333 *to* 343; and see 9 *How. Pr. R.* 304, 310, per Duer, J.; *s. c.* 3 *Duer*, 616; *ante, p.* 16, *note.*

If the Court of Appeals award to either party the costs of the appeal, they are to be taxed at the rate allowed by the Code of Procedure (§ 307, *sub.* 7, § 311). *Id. ibid.*

Awarding Restitution, &c.] Whenever the proceedings

brought before the Supreme Court by certiorari shall be reversed or quashed, the court may award restitution to the party injured, with costs; and may make such orders and rules, and issue such process, as may be necessary to carry their judgment into effect. 2 *R. S.* 516, *sec.* 48.

But where the proceedings of the landlord are reversed in the Supreme Court, upon certiorari, that court should not award restitution to the tenant, if the term has expired before the judgment of reversal is rendered. 1 *Comstock*, 420.

The court may give costs on the reversal of the judgment, whether restitution is awarded or not. *Ib.* 423, per Ruggles, J.

In cases of appeal to the county court from the decision of a justice of the peace, the court has no power, upon a reversal of the justice's judgment, to award restitution of the possession of the premises to the tenant. 11 *How. Pr. R.* 83.

Costs.] In all cases of an application under the statute, the prevailing party is entitled to costs, and may maintain an action for the recovery thereof. 2 *R. S.* 516, *sec.* 49.

The costs allowed are merely the fees of officers who are required to perform the services, such as the magistrate, sheriff, constable, &c., and do not embrace any compensation to the attorney or counsel. 5 *How. Pr. R.* 21; 6 *Id.* 178; 4 *Hill*, 541. County judges are not now entitled to fees in these proceedings. *Laws of* 1857, *chap.* 564.

To recover the costs of the proceedings on the application for the warrant, the party is limited to an action, in all cases, except where the proceedings are before a justice of the peace; in which case the justice is authorized to include the costs in his judgment, and to direct their collection in the warrant for delivery of possession, or by execution. *Laws of* 1849, *p.* 292, *sec.* 5, *sub.* 1.

If a certiorari is issued before the landlord's action to recover his costs is commenced, the action will be stayed until the writ is disposed of. And if issued while the action is pending, the certiorari suspends the force of the judgment before the officer, as well as the right to recover the costs. 5 *Sand.* 249.

Where the proceedings are taken by certiorari into the Supreme Court, and reversed or quashed, costs will be awarded to the successful party; 2 *R. S.* 516, *sec.* 48; and this, too, whether restitution is awarded or not. 1 *Coms.* 420, 423.

It is doubtful as to what law applies in regulating the allowance of costs on certiorari; though the better opinion is that they are to be taxed at the rate allowed by the Code for similar services in civil actions. *Laws of* 1854, *p.* 592; *ante*, *p.* 19; 7 *How. Pr. R.* 154; 9 *Id.* 304; *s. c.* 3 *Duer*, 616; and *ante*, *p.* 16, *note.*

In appeals to the Court of Appeals, if costs are awarded, the Code (§§ 311 *and* 307, *sub.* 7) is to determine the allowance. 9 *How. Pr. R. supra; ante*, *p.* 16, *note.*

The costs in proceedings before justices of the peace, are to be at the same rate of fees allowed by law in civil actions in justices' courts, and limited in like manner. *Laws of* 1849, *p.* 292, *sec.* 5, *sub.* 1; *Laws of* 1857, *vol.* 2, *p.* 723.

Damages on Reversal of Proceedings, &c.] The statute provides that in case the proceedings on the certiorari shall be reversed or quashed by the Supreme Court, the tenant or lessee may recover, by action, against the person making application for his removal, any damages he may have sustained by reason of such proceedings, with costs. 2 *R. S.* 516, *sec.* 49.

Saving of Rights.] It is also provided by the statute that nothing contained therein shall be construed to impair the rights of any landlord or lessor, or of any tenant in any case not therein provided for. *Ib. sec.* 50.

APPENDIX OF FORMS.

CHAPTER I.

FORMS IN ADMEASUREMENT OF DOWER.

No. 1.

Petition for Admeasurement.

See ante, p. 2.

To the Supreme Court of the State of New York [*or other court; or*, To M. F., Esquire, Surrogate of the county of ——].

The petition of A. B., of, &c., respectfully shows, that she is the widow of J. B., late of said town, deceased; that she was lawfully married to the said J. B. in his lifetime, and lived and cohabited with him until his decease, on the —— day of —— 18—; that the said J. B., at the time of his decease and prior thereto, was seized of an estate of inheritance, of and in the following lands and premises situated in said county, viz.: [*here describe the premises*] (*).

And your petitioner further shows, that W. B., an infant child and heir of the said J. B., deceased, and R. B., another son and heir of said deceased, claim to be the owners of said lands and premises, as the heirs at law of the said deceased; and your petitioner believes they are the owners of the said lands and premises, subject to your petitioner's right of dower in the same.

Your petitioner, therefore, prays for an order that admeasurement may be made of the dower of your petitioner in said lands and premises; and that three reputable and disinterested freeholders may be

appointed commissioners, for the purpose of making the said admeasurement, pursuant to the statute in such case made and provided.

J. S. C., Attorney for Petitioner. A. B.

County of —— ss. A. B., the petitioner above named, being duly sworn, says, That she has read the above petition, subscribed by her, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on information and belief, and that as to those matters, she believes it to be true.

Sworn, *&c.* A. B.

No. 2.

Notice of Application for Admeasurement.

See ante, p. 3.

To W. B. and R. B., heirs at law of J. B., late of the town of ——, deceased, and to all others claiming a freehold estate in the lands described in the annexed petition.

Take notice, that a petition, of which the annexed is a copy, will be presented to the Supreme Court [*or other court*], at the next special term thereof, to be held at the Court House in the village of ——, on the —— day of ——, 18—, at the opening of the court on that day, or as soon thereafter as counsel can be heard; and that a motion will then and there be made, that the prayer of the said petition be granted.

Dated, *&c.*

J. S. C., Attorney for Petitioner. Yours, &c., A. B.

No. 3.

Notice by Heirs, &c., to Widow.

See ante, p. 4.

To A. B., widow of J. B., late of, *&c.*, deceased.

Take notice, that you are required to make demand of your dower in the lands owned by the said J. B. at the time of his decease, within ninety days after the service of this notice. The said lands are bounded and described as follows: [*insert description.*] Dated, *&c.*

Yours, &c., R. B., *&c.*

No. 4.

Petition by Heirs, &c., for Admeasurement.

See ante, p. 4.

[*The petition and notice in Nos.* 1 *and* 2, *ante, may be modified so as to suit this case.*]

No. 5.

Petition for appointment of Guardian.

See ante, p. 4.

[*Same as in No.* 1 *to the* (*), *and then proceed as follows.*]

And your petitioner further shows, that W. B., of, *&c.*, is an infant under the age of twenty-one years, and is one of the owners of the lands and premises aforesaid, as your petitioner believes; that the said W. B. has no guardian; and that your petitioner has a right of dower in the said premises, and is desirous of obtaining an admeasurement thereof.

Your petitioner, therefore, prays that some suitable and proper person may be appointed guardian of the said infant, for the purpose of appearing for, and taking care of, the interest of such infant in the proceedings.

A. B.

J. S. C., Attorney for Petitioner.

[*Add jurat to petition, as in No.* 1.]

No. 6.

Order appointing Guardian.

See ante, p. 4.

At a special term of the Supreme Court [*or other court*], held at the Court House in ——, in and for the county of ——, on the —— day of ——, 18—,

Present, A. B. J., Justice.

In Supreme Court.

In the matter of the application of A. B. for the admeasurement of dower.

On reading and filing the petition of A. B., widow of J. B., late of the town of ——, deceased, dated the —— day of ——, 18—, showing that the said petitioner is desirous of obtaining an admeasurement of her dower interest in the lands and premises described in said petition, and praying that a guardian may be appointed for W. B., an infant, and one of the owners of said premises; It is, on motion of J. S. C., attorney for the petitioner, ordered, that O. F. T., a freeholder of said county, be and he is hereby appointed guardian of the said W. B., for the sole purpose of appearing for and taking care of the interest of the said infant in the proceedings.

No. 7.

Order for Admeasurement, and Appointing Commissioners.

See ante, p. 5.

At, *&c.* [*as in No.* 6].

[*Title as in No.* 6.]

On reading and filing the petition of A. B., widow of J. B., late of the town of ——, in the county of ——, deceased, dated the —— day of ——, 18—, and the notice accompanying the same; and also on reading and filing proof of the due service of the said petition and notice upon O. F. T., special guardian for W. B., an infant, and upon R. B., named in said petition, and after hearing J. S. C., of counsel for said petitioner, and O. F. T., the special guardian aforesaid, in behalf of said infant; It is ordered that admeasurement be made of the dower of the said A. B., in the lands of her husband, the said J. B., deceased, specified in said petition, and which are therein described as follows: [*insert description.*]

And it is further ordered, that J. R. L., J. C. B. and J. H. C., of, *&c.*, three reputable and disinterested freeholders, be and they are hereby appointed commissioners, for the purpose of making such admeasurement.

It is further ordered that the said commissioners report their proceedings to this court on the —— day of —— next.

No. 8.

Oath of Commissioners.

See ante, p. 6.

[*Title, as in No.* 6.] We, J. R. L., J. C. B. and J. H. C., commissioners appointed by the Supreme Court [*or other court*], to make admeasurement of the dower of A. B., above named, in the premises described in the order of said court, dated the —— day of ——, 18—, being duly sworn, do severally make oath, and each for himself makes oath and says, that he will faithfully, honestly, and impartially discharge the duty, and execute the trust reposed in him by such appointment.

[*Signatures of Commissioners.*]

Subscribed and sworn, *&c.*

No. 9.

Report of Commissioners.

See ante, p. 8.

[*Title, as in No. 6.*]

To the Supreme Court of the State of New York [*or other court, or*, To M. F., Surrogate of the county of ——].

The undersigned, J. R. L., J. C. B., and J. H. C., commissioners appointed by an order of the Supreme Court [*or other court, &c.*] dated the —— day of ——, 18—, to make admeasurement of the dower of A. B., above named, widow of J. B, late of the town of ——, in said county, deceased, in the lands and premises described in said order, and situated in the town of —— aforesaid, do respectfully report, that having first been duly sworn, faithfully, honestly, and impartially to discharge the duty and execute the trust reposed in us by the said appointment, we met on the premises hereinafter described on the —— day of ——, to discharge the duty and exercise the trust aforesaid, and as well the said A. B. and W. B., by his guardian, O. F. T., and R. B., by his attorney L. F., appeared at the time and place aforesaid [*or, if they did not appear, state the fact, and that they had been duly notified to appear at the time and place aforesaid*], whereupon the undersigned, commissioners, caused a survey of the said lands and premises to be made, in the presence of the said parties, a map of which survey is hereunto annexed.

And we do further report, that we have admeasured and allotted to the said A. B., for her dower in the said lands and premises, the one-third part thereof, which part is bounded and described as follows: [*insert description, containing the quantity, courses, and distances of the land admeasured and allotted to the widow, with a description of the posts, stones, and other permanent monuments thereof*] being the part designated on the said map, hereto annexed, by the letter "A."

We do further report that the following are the items of the charges attending said admeasurement, including our fees as commissioners, viz.:

Three days' services for each commissioner, at $2 per day for each, -	$18 00
Cash paid A. F. for two days' services as surveyor, $2 50 per day,	5 00
Cash paid for two chain and flag bearers, two days each, at $1 per day, for each .	4 00
	$27 00

In witness whereof, we have hereunto set our hands, this —— day of ——, A. D. 18—. [*Signatures of Commissioners.*]

No. 10.

Notice of Motion to Confirm Report.

See ante, p. 9.

[*Title as in No.* 6.]

Sir,—Take notice that I shall move the Supreme Court [*or other court*], at the next special term thereof, to be held at the Court-house in ——, in the county of ——, on the —— day of —— next, or as soon thereafter as counsel can be heard, for an order confirming the report of the commissioners appointed to make admeasurement of the dower of A. B., in the premises mentioned in said report; and for such other or further order as may be just, which motion will be founded upon the said report, a copy of which is herewith served. Dated, *&c.*

Yours, &c., J. S. C., Atty. for A. B.

To O. F. T., special guardian for W. B., and
L. F., Attorney for R. B.

No. 11.

Order Confirming Commissioners' Report.

See ante, p. 9.

At, *&c.* [*as in No.* 6.]

[*Title, as in No.* 6.] On reading and filing the report of J. R. L., J. C. B. and J. H. C., commissioners appointed to admeasure the dower of A. B., widow of J. B., late of the town of ——, in the county of ——, deceased, which report is dated the —— day of ——, 18—, and by which it appears, among other things, that the said commissioners have admeasured and allotted to the said A. B., for her dower, the one-third part of the lands and premises described in the order appointing said commissioners, a map of which is annexed to said report, which third part so allotted to the said A. B. is particularly described in said report, as will more fully appear by reference to said report, and to the minutes of the court where said report is entered at large.

Now, on motion of J. S. C., attorney for the said A. B., no one appearing to oppose [*or*, and after hearing O. F. T., special guardian for W. B., and L. F., attorney for R. B.], it is ordered that the said report and admeasurement be, and the same is, in all respects confirmed.

No. 12.

Notice of Appeal.

See ante, p. 11.

R. B. and O. F. T., Appellants,
against
A. B., Respondent.

To A. B. Take notice,—That the above named appellants appeal to the Supreme Court, from an order made by the county court of the county of —— [*or*, by M. F., surrogate of the county of ——], confirming the report and admeasurement of J. R. L., J. C. B. and J. H. C. commissioners appointed by the said court [*or*, surrogate] to admeasure and set off to the said A. B., the one-third part of the lands and premises, mentioned in said report. Dated, *&c.*

Yours, &c., L. F., Atty. for Appellants.

To A. B., Respondent.

No. 13.

Bond on Appeal.

See ante, p. 12.

Know all men by these presents, That we, O. F. T., of, *&c.*, and R. B. of the same place, and S. R. C., of, *&c.*, are held and firmly bound unto A. B. of, &c., in the penal sum of one hundred dollars, to be paid to the said A. B., her executors, administrators and assigns; for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated the —— day of —— 18—.

Whereas, the above-bounden, O. F. T. and R. B., have this day appealed to the Supreme Court, from the admeasurement of the dower of the above-named A. B., lately made by J. R. L., J. C. B., and J. H. C., commissioners appointed by the county court of said county of—— [*or*, by M. F., surrogate of the county of ——] to admeasure and set off for the dower of the said A. B., one third part of the land and premises described in their report to the said court [*or*, surrogate], and from an order confirming the said report and admeasurement.

Now, the condition of this obligation is such, that if the above-bounden, O. F. T. and R. B., shall diligently prosecute the said appeal, and shall pay all costs that may be adjudged by the Supreme

Court against the said appellants, then the above obligation to be void, otherwise to remain in full force and virtue.

[*Signatures and Seals.*]

Sealed and delivered, *&c.*

[*Endorse upon the bond the following certificate:* The security in the within bond is approved, Dated, *&c., which is to be signed by the surrogate or a judge of the court by which the order appealed from was made.*]

No. 14.

Order of Reversal.

See ante, p. 13.

At a general term of the Supreme Court held at the Court House in ——, in the county of ——, on the —— day of ——, 18—.

Present, C. L. A., A. B. J., and E. H. R., Justices.

SUPREME COURT.

O. F. T. and R. B., Appellants,
against
A. B., Respondent.

On reading and filing an appeal from the admeasurement of dower made in pursuance of an order of the county court of the county of —— [*or*, in pursuance of an order made by M. F., surrogate of the county of ——], and the affidavits and report of commissioners and other papers accompanying the said appeal; and on hearing L. F., attorney for the appellants, and J. S. C., attorney for the respondent, it is ordered, that the order confirming the said report, and the admeasurement of dower therein made, be, and the same is hereby, vacated and set aside. (*)

And it is further ordered that the commissioners appointed by the said court [*or*, surrogate], proceed to admeasure the dower of the said A. B., as in the order appointing said commissioners they were directed to do.

No. 15.

Another form of order of reversal, where the right of dower is in mines which have been worked.

See ante, p. 13. 1 Cowen, 480.

[*Same substantially as in last form to the* (*) *and then proceed:*]

And it is further ordered that the commissioners proceed to assign to the said Maria, her reasonable dower in the lands and tenements mentioned and described in the order of the said surrogate.

And whereas it appears that on the premises in which dower is claimed, there is a valuable *iron ore bed*, which J. C., the husband of the said Maria, opened and worked in his lifetime, and that he was the owner and proprietor of the said lands, when the said ore bed was opened and worked, as aforesaid; by reason whereof the said Maria is dowable of, and in, all such ore beds on the said premises as were, in fact, opened and wrought before the death of her said husband, and wherein he had an estate of inheritance during the coverture; It is therefore further ordered, that in making the assignment, the admeasurers estimate the annual value of the ore beds that had been opened as aforesaid, as part of the value of the estate of which the said Maria is dowable; that the admeasurers may, in their discretion, assign the dower of the said Maria, in land set out by metes and bounds, and containing none of the said ore beds, or they may include any of the said ore beds, so as aforesaid opened, in the said assignment, describing them specifically, if the particular lands in which they lie should not also be assigned; but if those lands should be included in the assignment, the open ore beds within them need not be so described, being part of the land itself assigned; or the said admeasurers may divide the enjoyment or perception of the profits of any of the said open ore beds, by directing a separate alternate enjoyment of the whole, at short periods, proportioned to the share each party had in the subject, or by giving the said Maria a proportion of the profits. In each and every case, however, the said admeasurers are not to take into account, or assign dower of any part or portion of said ore bed opened by said A. C., the appellant, and others, since the death of the said J. C., nor the improvements made on the said premises by the said A. C., and others, since the death of the said J. C.

CHAPTER II.

FORMS IN ARBITRATIONS.

No. 16.

General Submission to Arbitration.

See ante, p. 28.

WHEREAS divers disputes and controversies have existed and arisen, and are now existing and pending, between A. B. of the town of —— in the county of ——, and C. D. of the same place. Now, therefore, we the undersigned, A. B. and C. D. aforesaid, do hereby mutually covenant and agree to and with each other, that E. F., G. H. and K. L. of, *&c.*, or any two of them, shall arbitrate, award, order, adjudge, and determine of and concerning all and all manner of actions, cause and causes of action, suits, bills, bonds, judgments, quarrels, controversies, trespasses, damages, claims and demands whatsoever, now pending, existing or held, by and between us the said parties. And we do further mutually covenant and agree, to and with each other, that the award to be made by the said arbitrators, or any two of them, shall in all things by us, and each of us, be well and faithfully kept and observed;—provided that the said award be made in writing and signed by the said E. F., G. H. and K. L. or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the —— day of —— next ensuing the date hereof.

[*If a judgment is intended to be entered on the award, in pursuance of the statute, add the following clause:* And it is hereby further mutually agreed by and between the said parties, that judgment in the Supreme Court of the State of New York [*or*, County Court of —— county, *or other court of law and of record*] shall be rendered upon the award to be made pursuant to this submission.]

Witness our hands this —— day of ——, 18—.

In presence of A. B.

M. N. C. D.

No. 17.

Bond of Arbitration. (*a*)

See ante, p. 28.

Know all men by these presents: That I, A. B. of the town of —— in the county of —— am held and firmly bound unto C. D. of the same place [*or as the case may be*], in the sum of five hundred dollars, lawful money of the United States, to be paid to the said C. D., or to his certain attorney, executors, administrators, or assigns, for which payment to be well and faithfully made, I bind myself, my heirs, executors and administrators firmly by these presents, sealed with my seal, and dated the —— day of —— A. D. 18—. (*)

The condition of this obligation is such that if the above-bounden A. B. shall well and truly submit to the decision and award of E. F., G. H. and K. L., arbitrators, named, selected and chosen, as well by and on the part and behalf of the said A. B. as of the said C. D. to arbitrate, award, order, adjudge and determine of and concerning all and all manner of actions, cause and causes of action, suits, controversies, claims and demands, whatsoever, now depending, existing or held, by and between the said A. B. and the said C. D., so as the said award be made in writing, and signed by the said E. F., G. H. and K. L., or any two of them, and ready to be delivered to the said parties, or such of them as shall desire the same, on or before the —— day of ——, 18—, then this obligation to be void, or else to remain in full force and virtue.

[*If there is no submission in writing, separate from the bond, and it is intended to have a judgment on the award in pursuance of the statute, insert the following clause*: And the above-bounden A. B. hereby agrees that judgment in the Supreme Court of the State of New York, [*or*, county court of —— county; *or other court*], shall be rendered upon the award to be made pursuant to this submission].

Signed, sealed, and delivered in presence of M. N. A. B. (L. S.)

No. 18.

Bond for an Award by an Umpire.

See ante, p. 28.

[*Proceed as in last form to the asterisk* (*) *and then continue:*]

The condition of the above obligation is such that if the above-

(*a*) The parties should execute bonds to each other. The obligor in one will be the obligee in the other.

bounden A. B. shall well and truly submit to the decision and award of E. F. and G. H., arbitrators indifferently named, selected, and chosen, as well by and on the part and behalf of the said A. B. as of the said C. D. to arbitrate, award, order, adjudge, and determine of and concerning all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatsoever, now depending, existing, or held, by and between the said A. B. and the said C. D., so as the said award be made in writing, signed by the said E. F. and G. H., and ready to be delivered to the said parties, or such of them as shall desire the same, on or before the —— day of ——, 18— (*); but if the said arbitrators do not make such their award of and concerning the premises by the time aforesaid, then if the said A. B. shall in all things well and truly stand to, obey, perform, fulfill and keep the award, order, arbitrament, umpirage, and final determination of such person as the said arbitrators shall appoint as an umpire between the said parties, of and concerning the premises aforesaid, so as the said umpire do make his award or umpirage of and concerning the said premises in writing, signed by the said umpire, and ready to be delivered to the said parties or such of them as shall desire the same, on or before the —— day of —— 18—; then the above obligation to be void, or else to remain in full force and virtue.

[*If a judgment is intended to be entered on the award, in pursuance of the statute, then add the following clause:* And the above-bounden A. B. hereby agrees that judgment in the Supreme Court of the State of New York [*or other court,*] shall be rendered upon the award to be made pursuant to this submission.]

Signed and sealed in presence of M. N. A. B. [L. S.]

No. 20.

Condition providing for a third Arbitrator.

See ante, p. 28.

The condition of this obligation is such, *&c.*, [*as in last form, to the* (*)—*then proceed:*] But if the said arbitrators do not make such their award by the time aforesaid, then if the said A. B. shall in all things well and truly stand to, obey, perform, fulfill and keep the award, order, arbitrament, and final determination, of and concerning the premises aforesaid, which either of said arbitrators shall make with such person as they shall appoint as an arbitrator to act with them, or one

of them, in hearing and determining the said matters in controversy, so as the said award be made in writing, and signed by the said arbitrators, or any two of them, and ready to be delivered to the said parties, or such of them as shall desire the same, on or before the —— day of —— 18—, then the above obligation to be void, or else to remain in full force and virtue, *&c.* [*as in last form*].

No. 21.

Arbitrator's Oath.

See ante, p. 32.

You and each of you do swear that you will faithfully and fairly hear and examine the matters in controversy submitted to you as arbitrators, by and between A. B., of the one part, and C. D., of the other part, and a just award thereof make, according to the best of your understanding.

No. 22.

Notice of Hearing before Arbitrators.

See ante, p. 32.

In the matter of an arbitration, of and concerning certain matters in difference between A. B., of the one part, and C. D., of the other part.

SIR:—Take notice, that the above matter will be brought to a hearing before the arbitrators appointed therein, at the office of —— in the village of —— on the —— day of —— 18—, at —— o'clock, in the —— noon of that day.

Yours, &c.,

To C. D.

A. B.

No. 23.

Oath on Application for a Subpœna.

See ante, p. 34.

You do swear that you will true answers make to such questions as I shall put to you, touching the necessity and propriety of my issuing a subpœna upon your present application for the same.

No. 24.

Subpœna to appear before Arbitrators.

See ante, p. 34.

The People of the State of New York: To O. P., Q. R., and S. T.:—

You and each of you are commanded personally to appear and attend at the office of —— in the village of —— in said county, on the —— day of —— 18—, at —— o'clock, in the ——noon of that day, before E. F., G. H., and K. L., arbitrators, chosen to determine a controversy between A. B., on the one part, and C. D., on the other, then and there to testify as a witness in relation thereto, before the said arbitrators, on the part of the said A. B. Hereof fail not at your peril. Given under my hand, this —— day of —— 18—.

O. S., Justice of the Peace.

No. 25.

Oath of Witness.

See ante, p. 34.

You do swear that the evidence you shall give to these arbitrators [*or*, this arbitrator, *or*, this umpire], touching or concerning the matters in difference submitted for their [*or*, his] determination and award, by and between A. B., of the one part, and C. D., of the other part, shall be the truth, the whole truth and nothing but the truth. [*Or*, *the oath may be varied, as follows:* You do solemnly, sincerely, and truly affirm and declare, that, *&c.*, *as above.*]

No. 26.

Revocation.

See ante, p. 52.

To. E. F., G. H., and K. L.:—Take notice, that I do hereby revoke your powers as arbitrators, under the submission made to you by C. D. and myself, by our mutual bonds [*or*, agreement in writing], dated, *&c.* Witness my hand and seal, (*a*) this day of —— 18—. A. B.

No. 27.

Notice of Revocation.

See ante. p. 52.

To C. D.:—Take notice, that I have this day revoked the powers of E. F., G. H., and K. L., arbitrators, chosen to settle the matters in controversy between us, by an instrument of revocation, of which, see a copy below. Dated —— day of —— 18—.

Yours, &c., A. B.

[*Here insert copy of revocation.*]

(*a*) The revocation need not be under seal unless the submission was under seal.

No. 28.

Award.

See *ante*, pp. 34 to 40.

To all to whom these presents shall come, or may concern: E. F., G. H., and K. L., send greeting.

Whereas, divers suits, disputes, controversies, and differences, have happened and arisen, and are now depending, between A. B., of ——, and C. D., of ——, for pacifying, composing, and ending whereof, the said A. B., and C. D., have entered into a written agreement, dated the —— day of —— last past, to submit the said matters to the award and final determination of the said E. F., G. H., and K. L., arbitrators, selected by the said parties, as by reference to which agreement will more fully appear, [*or*, the said A. B., and C. D., have bound themselves each to the other in the penal sum of $——, by bonds, bearing date the —— day of —— last past, with condition thereunder written, to stand to, obey, abide, perform, and keep the award, order, arbitrament, final end and determination of the said E. F., G. H., and K. L., arbitrators, selected by the said parties, as by reference to the said bonds of submission will more fully and at large appear.]

Now, therefore, know ye that the said E. F., G. H., and K. L., having taken upon themselves the charge and burden of the said award, and having deliberately heard the allegations and proofs of the said parties, do by these presents, arbitrate, award, order, and adjudge of and concerning the premises in manner and form following, that is to say:

First. They do award, order, and adjudge that the said C. D. or his representatives, shall and do on or before the —— day of —— next ensuing the date hereof, make and execute a good and sufficient conveyance of his interest as lessee for years of a certain farm in the possession of the said C. D., situate [*describe the premises*], pursuant and according to the true intent and meaning of certain articles of agreement, bearing date on or about the —— day of —— and made between the said C. D. of the one part and the said A. B. of the other part.

Second. The said arbitrators do further award, order and adjudge that the said C. D., his executors or administrators, shall and do, on or before the —— day of —— next ensuing the date hereof, pay, or cause to be paid unto the said A. B., his executors, administrators or assigns, the sum of —— dollars, in full payment, discharge and satisfaction of and for all moneys, debts, duties, due or owing unto the said A. B. by

the said C. D. upon any account whatsoever, at any time before their entering into the said agreement of submission [*or*, bonds of arbitration] as aforesaid.

Third. The said arbitrators do hereby further award, order and adjudge, that all actions and suits commenced, brought or depending between the said A. B. and C. D. for any matter, cause or thing whatsoever, arising or existing at the time of, or before, their entering into the said agreement of submission [*or*, bonds of arbitration], shall from henceforth cease and determine, and be no further prosecuted or proceeded in by them, or either of them, or by their, or either of their, means, consent or procurement.

And lastly. The said arbitrators do hereby further award, order and adjudge that the said A. B. and C. D. shall and do within the space of —— days next ensuing the date of this present award, seal and execute unto each other, mutual and general releases of all actions, cause and causes of actions, suits, controversies, trespasses, debts, duties, damages, accounts and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of the said agreement of submission [*or*, bonds of arbitration], as aforesaid.

In witness whereof the said arbitrators have hereunto set their hands and seals, this —— day of —— 18—. [*Signatures and Seals.*]

Signed and sealed, in presence of

A. T.

No. 29.

Affidavit proving the Award.

See ante, p. 42.

County of —— ss. A. T. of —— in said county, being duly sworn, deposes and says: That he was present and saw E. F., G. H. and K. L. sign, publish and declare, their final award and determination in writing between A. B. of, *&c.*, and C. D., of, *&c.*, bearing date the —— day of —— 18—, and hereunto annexed; that the names E. F., G. H. and K. L. subscribed to the said award, are the proper and genuine signatures of the said E. F., G. H. and K. L., and that they severally acknowledged the execution thereof; and that the said deponent set his name as a subscribing witness to the said award, at the time of its execution and publication as aforesaid; and further he says not.

Sworn to, *&c.* A. T.

No. 30.

Affidavit Proving the Bond of Arbitration.

See ante, p. 42.

County of ——, ss. M. N., of ——, in said county, being duly sworn says: That he was present and saw A. B. sign, seal, acknowledge and deliver, as and for his act and deed, the within bond of arbitration; that the name A. B., subscribed to the said bond, is the proper and genuine signature of the said A. B.; and that the said deponent set his name as a subscribing witness to the same, at the time of its execution and delivery by the said A. B. as aforesaid; and further says not.

Sworn to, *&c.* M. N.

No. 31.

Affidavit proving the Agreement of Submission.

See ante, p. 42.

County of ——, ss. M. N., of —— in said county, being duly sworn, deposes and says: That he knew A. B. and C. D., the individuals described in and who executed the within agreement of submission, that he was present and saw them sign, acknowledge, and deliver the same as and for their act and deed, and that he set his name as a subscribing witness to the same, at the time of the execution and delivery of the said agreement, as aforesaid. M. N.

Sworn to, *&c.*

No. 32.

Notice of Motion to Confirm the Award.

See ante, p. 42.

SUPREME COURT [*or other court.*]

In the matter of an Arbitration of and concerning certain matters in difference between A. B. of the one part, and C. D. of the other part.

SIR: Take notice that I shall move the Supreme Court, at the next special term thereof, to be held at the Court House in ——, in and for the county of ——, on the—— day of —— next, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order (*) that the award made by the arbitrators in the above matter, be confirmed; and that judgment be rendered thereon in favor of the

said A. B.; and for such further, or other order as the court may think proper to grant,—which motions will be founded upon the agreement of submission [*or*, bond of arbitration], and proof thereof, and the award of said arbitrators, and the proof thereof. Dated the —— day of ——, 18—. Yours, &c.,

L. P. C., Atty. for A. B.

To C. D., above mentioned.

No. 33.

Notice of Motion to Vacate the Award.

See ante, pp. 43, 45.

[*As in last form to the* (*)—*then as follows :*] That the award made by the arbitrators in the above matter be set aside and vacated with costs; and for such further or other order as the court may think proper to grant,—which motions will be founded upon the affidavits, with copies of which you are herewith served, and also upon the agreement [*or*, bond] of submission, and the award of said arbitrators.

The following are the grounds upon which it is sought to vacate said award : [*Here set forth the irregularities complained of.*]

Dated the —— day of ——, 18—. Yours, &c.,

J. S. C., Atty. for C. D.

To A. B., above mentioned.

No. 34.

Notice of Motion to Modify or Correct the Award.

See ante, pp. 45, 46.

[*As in No.* 32, *to the asterisk*, (*)—*then as follows* :] That the award made by the arbitrators in the above matter, be modified and corrected in the following particulars : [*Here set forth the particulars as to which the party desires the award to be modified, or corrected ; and then continue* :] and for such further, or other order, as thecour may think proper to grant,—which motions will be founded upon the said award, and the agreement [*or*, bond] of submission between the said parties, and also upon an affidavit, with a copy whereof you are herewith served. Dated the —— day of ——, 18—.

Yours, &c.,

L. F., Atty. for A. B.

To C. D., above mentioned.

No. 35.

Order confirming Award, and for Judgment.

See ante, p. 47.

At, *&c.* [*as in No.* 6.]

[*Title as in No.* 32.] On reading and filing the award, *&c.* [*recite the papers on which the motion is founded*], and on motion of L. P. C., of counsel for A. B., one of the parties to said arbitration, no one appearing to oppose [*or*, and on hearing J. S. C., of counsel for C. D., the other party to said arbitration, in opposition thereto], it is ordered that the award of the arbitrators in this matter be, and the same hereby is, confirmed. It is further ordered and adjudged that the said A. B. do recover against the said C. D., the sum of —— dollars awarded to the said A. B., in the said award, and also —— dollars and —— cents, for his costs and charges by the court now here adjudged to the said A. B., which said sum, so awarded as aforesaid, and said costs and charges, in the whole amount to —— dollars.

And it is further ordered that the said C. D. execute and deliver to the said A. B., a good and sufficient conveyance of his interest as lessee for years, of a certain farm in the possession of the said C. D., situated in the town of, *&c.*, [*describe the premises*] in the manner required in and by the said award.

No. 36.

Order vacating Award.

See ante, p. 46.

[*Title as in No.* 32, *then as follows*:] On reading and filing affidavits and notice of motion, and the award and the agreement [*or*, bond] of submission in the above matter, and on motion of J. S. C., of counsel for C. D., one of the parties to said arbitration, no one appearing to oppose [*or*, and on hearing L. P. C., of counsel for A. B., the other party to said arbitration, in opposition thereto], it is ordered that the award of the arbitrators in this matter be, and the same hereby is, vacated, with —— dollars costs, to be paid by the said A. B., to the said C. D.

No. 37.

Judgment Record.

See ante, p. 49. Yates' Pl. 813.

Pleas before the Supreme Court of the State of New York, the 21st day of February, in the year of our Lord one thousand eight hundred and fifty-eight. Witness, C. L. A., Justice of the Supreme Court.

County of —— *ss.* Be it remembered that at a special term of this court held at the Court House in the village of —— on the —— day of February, in the year of our Lord one thousand eight hundred and fifty-eight, A. B., by L. P. C., his attorney, being in the Supreme Court of the State of New York, brings, according to the statute in such case made and provided, a certain submission of matters in difference between the said A. B., of the one part, and C. D., of the other part to E. F., G. H., and K. L., which submission was made by an agreement in writing executed by the said parties, and is in the words and figures following, that is to say [*copy agreement*], [*or*, which submission was made by bonds of arbitration executed by the said A. B., of the one part, and the said C. D. of the other part, one of which said bonds executed by the said C. D., is in the words and figures following, that is to say, [*copy the bond.*] The said agreement [*or*, bond] of submission was duly proved by the affidavit of M. N., a subscribing witness thereto, in the words and figures following, that is to say: [*copy affidavit.*] And the said A. B. says, that after the making of the said submission, to wit, on the —— day of January, last past, the said arbitrators met at the house kept by —— in the village of —— and as well the said C. D., as the said A. B. appeared before the said arbitrators; and the said arbitrators did then and there proceed to the hearing and examination of the matters in controversy, and of the proofs and allegations of the respective parties, and continued such hearing, by adjournment from time to time, until the —— day of February, instant, on which day, last aforesaid, the said arbitrators made and signed their award in writing under their hands and seals, in the words and figures following, that is to say: [*copy award*], which award is duly proved by the affidavit of A. T., a subscribing witness thereto.

And hereupon the said A. B. prays that the said award may be in all things confirmed, together with his costs and charges in and about the confirmation of said award. And the said C. D., by J. S. C., his attorney, comes and says nothing in bar or preclusion thereof. Where-

upon the matters aforesaid having been seen, and by the court now here fully understood, and mature deliberation thereupon had,

It is hereby ordered, adjudged and determined that the said award be in all things confirmed, and that the said C. D. do execute and deliver to the said A. B., a good and sufficient conveyance of his interest as lessee for years, of a certain farm in the possession of the said C. D., situate in the town of, *&c.* [*describe the premises and the order, the same as it is in the award.*]

And it is hereby further ordered, adjudged and determined, that the said A. B., do recover against the said C. D., the sum of —— dollars, so awarded to be paid by the said C. D.; and also —— dollars and —— cents for his costs by him about his proceedings in this behalf expended, by the court aforesaid now here adjudged to the said A. B., which damages and costs amount to —— dollars and —— cents.

Judgment signed this —— day of ——, A. D., 18—. N. B. M., clerk.

CHAPTER III.

FORMS ON THE FORECLOSURE OF MORTGAGES BY ADVERTISEMENT.

No. 38.

Notice of Sale.

See ante, p. 62.

MORTGAGE SALE.

Whereas, default has been made in the payment of the money secured by a mortgage, dated the —— day of ——, 18—, executed by —— and —— his wife, of the town of ——, county of ——, New York, to ——, of the same place [*or as the case may be*], and which mortgage was recorded in the clerk's office of said county in Book No ——, of mortgages, on page ——, on the —— day of ——, 18—, at —— o'clock, — M. [*If the mortgage is foreclosed by the assignee, then say:* And whereas the said mortgage has been duly assigned to ——, of ——, and the same is now owned by him.] And whereas the amount claimed to be due upon said mortgage at the time of the first publication of this notice, is the sum of —— dollars, and —— cents, to wit.: $—— of principal, and $—— of interest, and which is the

whole amount claimed to be unpaid on said mortgage [*or*, and the whole amount claimed to be unpaid on said mortgage is the sum of —— dollars].

Now, therefore, notice is hereby given, that by virtue of the power of sale contained in said mortgage, and duly recorded as aforesaid, and in pursuance of the statute in such case made and provided, the said mortgage will be foreclosed by a sale of the premises therein described, at public auction, at the front door of the Court-house [*or*, hotel, kept by ——], in the town, [*or*, city], of ——in the county of —— on the —— day of —— next, at ten o'clock in the forenoon of that day.

The said premises are described in said mortgage as follows: [*or*, substantially as follows: *and then give description of premises as stated in the mortgage*].

Dated the —— day of —— 18—. [*Date of the first publication of the notice.*] A. B., mortgagee [*or* assignee].

L. P. C., Attorney.

No. 39.

Affidavit of Publication of Notice of Sale.

See ante, p. 72.

State of New York, county of ——. } ss. E. F., of —— in said county, being duly sworn says: That he is, and during the whole time hereinafter mentioned, has been, the printer, [*or*, foreman, *or*, principal clerk of the printer], of the —— Herald, a newspaper printed in said county of ——, and that the annexed printed notice of sale was published in the said newspaper twelve weeks, successively, at least once in each week; which publication commenced on the —— day of ——, 18—, and terminated on the ——day of ——, 18—. E. F.

[*Attach here a printed notice of sale.*]

Sworn to, before me, this —— day of ——, 18—.

J. A. M., Justice of the Peace.

No. 40.

Affidavit of Affixing Notice on Court-House Door.

See ante, pp. 72, 73.

State of New York, county of ——. } ss. C. D., of ——, in said county, being duly sworn, says: That on the —— day of ——, 18—, he affixed a true copy of the annexed printed notice in a conspicuous place, and in a proper and substantial manner, on the outward door of the building

[*Attach here a printed notice of sale.*]

where the county courts are directed to be held in the county of ——, to wit., at the Court-House [*or as the fact may be*], in the town [*or*, city], of ——, in said county. [*If there be two or more such buildings in the county, then add:* that being the building where such courts are directed to be held nearest to the premises described in said notice]. C. D.

Sworn, *&c.* [*as in No.* 39].

No. 41.

Affidavit of Affixing Notice in Clerk's Office.

See ante, p. 73.

State of New York, county of —— } ss. C. D., of —— in said county being duly sworn says: He is the clerk of said county. That on the —— day of ——, 18—, he affixed a true copy of the annexed printed notice of sale in the book prepared and kept by him, as such clerk, for that purpose, at the clerk's office in —— in said county. [*Attach here a printed notice of sale.*]

[*Or, if the affidavit is made by one who saw the notice affixed, say:* L. P. C., of ——, in said county, attorney at law, being duly sworn says, that he saw a true copy of the annexed printed notice affixed in the book prepared and kept for that purpose by the clerk of said county of ——, at his office in ——, in said county, during the time required, to wit on the —— day of ——, 18—. [*The time stated should be twelve weeks prior to the time of sale.*] C. D.

Sworn, *&c.* [*as in No.* 39].

No. 42.

Affidavit of Service of Notice of Sale.

See ante, pp. 65, 73.

State of New York, county of —— } ss. L. P. C., of ——, in said county, attorney at law, being duly sworn says: That on the —— day of —— 18—, he served upon A. B., C. D. and E. F., and each and every of them, a copy of the annexed printed notice of sale, by delivering to the said persons, and each and every of them personally, a true copy of the said notice. [*Attach here a printed notice of sale.*]

[*If the service was by leaving the notice at the dwelling-house, then say:*] That on the —— day of ——, 18—, he served upon A. B. a copy of the annexed printed notice of sale by leaving a true

copy thereof at his dwelling-house in charge of the wife [*or*, daughter, aged eighteen years or thereabouts] of the said A. B.

[*If the service was by depositing in the post-office, say:*] That on the —— day of ——, 18—, he served upon A. B. a copy of the annexed printed notice of sale by depositing a true copy thereof in the post-office in ——, properly folded and directed to the said A. B. at his place of residence, to wit., at ——, and paying the postage on the same. L. P. C.

Sworn, *&c.* [*as in No.* 39].

No. 43.

Affidavit of Sale.

See ante, p. 73.

State of New York, county of ——} ss. L. M., of —— in said county, being duly sworn says: That he officiated as auctioneer at the sale of the premises hereinafter mentioned; and as such auctioneer sold the premises described in the annexed printed copy of notice of sale, at public auction, at the time and place of sale therein mentioned, to wit, on the —— day of ——, 18—, at — o'clock in the ——noon, at the front door of the Court House [*or*, Hotel, kept by ——] in the town [*or*, city,] of ——, in the county of ——, aforesaid; and that J. R., of ——, then and there purchased the said premises for the price of —— dollars, he being the highest bidder, and that being the highest sum bidden for the same.

[*Attach here a printed copy of the notice of sale.*]

And deponent further says, That said sale was in all respects honestly and fairly conducted, as deponent verily believes; and that the said J. R. purchased the said premises fairly and in good faith, as deponent also verily believes, L. M.

Sworn, *&c.* [*as in No.* 39].

No. 44.

Sketch of Bill of Costs on Foreclosure.

See ante, pp. 77 to 79.

Dr. notice of sale, fol. 5, at 2s. . . .	$1 25
Copy same to keep at 1s.	62½
Copy notice for printer, at 1s.	62½

Copy notice for posting on Court House door, at 1s. . 62½
Expense of posting, ... 1 00
Dr. affidavit of posting, fol. 2, and copy, at 3s. . . 75
Copy notice annexed, at 1s. 62½
Copy notice for posting in clerk's office, at 1s. . . 62½
Clerk's fees on same, ... 25
Dr. affidavit of posting in clerk's office, fol. 2, and copy, at 3s. 75
Copy notice annexed, at 1s. 62½
Printer publishing notice, 13 insertions, fol. 5, . . 14 50
" " two postponements of sale, 2 ins., 1 fol. each, 1 20
" " two additional insertions of notice of sale, 2 00
Dr. affidavit of publication, fol. 2, and copy, at 3s. . 75
Copy notice annexed, at 1s. 62½
Copy notice to serve on mortgagor, at 1s. . . . 62½
Serving notice, ... 1 00
[*Same charges for each and every other notice served, if any.*]
Dr. affidavit of service, fol. 2, and copy, at 3s. . 75
Copy notice annexed, fol. 5, at 1s. . . . 62½
Postages [*to be stated by items.*]
Clerk's fees for searches [*the fees actually paid.*]
Dr. affidavit of circumstances of sale, fol. 4, and copy, at 3s. 1 50
Copy printed notice annexed, ... 62½
Superintending sale, &c. 10 00
Recording affidavits [*the fees actually paid.*]
Oaths to five affidavits, 10 cts. each, . . . 50
[*If a deed has been executed by the mortgagee to the purchaser, then add:*]
Dr. deed to purchaser, 6 fols. and copy, at 3s. . . 2 25
Acknowledgment of deed, 2s. 25
Recording same [*the fees actually paid.*]

No. 45.

Notice of Taxation of Costs.

See ante p. 79.

[*To be endorsed on copy bill to be served.*]

To C. D. Sir: Take notice that the bill of costs of which the within is a copy, will be presented for taxation to C. L. A., Esquire, justice of the Supreme Court [*or*, to A. D. W., Esquire, county judge],

at his office in —— in said county, on the —— day of —— next [*or*, instant], at ten o'clock in the forenoon. Dated the ——, day of ——, 18—.

Yours, &c.,

L. P. C., Att'y. for Mortgagee.
[*or*, Assignee.]

No. 46.

Affidavit of Disbursements.

See ante, p. 79.

State of New York,
County of —— ss.

L. P. C., of ——, in said county, being duly sworn says: That he is the attorney for ——, the mortgagee [*or*, assignee] of a mortgage executed by ——, to ——, and which has been duly foreclosed under the statute. That according to the best of deponent's knowledge and belief, the several disbursements charged in the bill of costs hereto annexed have been actually and necessarily paid or incurred. That the copies of papers charged therein were actually and necessarily used or obtained for use. That such bill of costs contains no charge for any draft or copy of any affidavit, or other paper, which has not been made, or for any other service which has not been performed, except such services as are allowed by law to be taxed prospectively; and that the number of folios contained in the draft, or in the copies of said papers, are not overcharged in such bill.

L. P. C.

Sworn, *&c.* [*as in No.* 39.]

No. 47.

Mortgagee's deed on Foreclosure.

See ante, p. 75.

[*Omitted for want of room.—See form in "New Clerk's Assistant."*]

CHAPTER IV.

FORMS IN FORCIBLE ENTRIES AND DETAINERS.

No. 48.

Complaint and Affidavit.

See ante, p. 84.

County of —— ss.: To A. D. W., Esq., county judge of the county of ——, [*or other officer to whom the application is made.*]

The complaint of A. B., of ——, in said county, shows: That C. D., of ——, in said county, at the town [*or*, city] aforesaid, on the —— day of ——, 18—, did unlawfully make a forcible entry [*or*, did make entry in a forcible manner, *according to the fact*], into the lands and premises of this complainant, to wit: the, *&c.* [*describe premises particularly*], and that the said C. D. did then and there violently, forcibly, and unlawfully, and with strong hand, eject and expel this complainant from his said lands and premises [*or*, hold this complainant out of possession of his said lands and premises].

And the said complainant further shows, That he had at the time aforesaid an estate of freehold [*or other estate, as the case may be*] then and still subsisting, in the lands and premises aforesaid; and that the said C. D. still unlawfully and forcibly holds and detains the said lands and premises from the said A. B., against the form of the statute in such case made and provided. Dated this —— day of ——, 18—.

A. B.

County of —— ss.: A. B., of ——, in said county, being duly sworn, says: He is the complainant above named; that the foregoing complaint is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn, *&c.* A. B.

No. 49.

Precept for Jury.

See ante, p. 84.

The People of the State of New York to the sheriff, or any constable of the county of ——, greeting:

You are hereby commanded to cause to come before me, at my office in ——, in said county, on the —— day of ——, 18—, at 10 o'clock in the forenoon, twenty-four inhabitants of the said county, duly qualified by law to serve as jurors, to inquire upon their oaths for the said people, of a certain forcible entry made by C. D., as it is said, into the lands and premises of A. B., in the —— of ——, in said county [*or*, certain forcible holding out of possession of A. B., by one C. D., of the lands and premises of the said A. B., situated in ——, in said county], against the form of the statute in such case made and provided.

Given under my hand, this —— day of ——, 18—.

A. D. W., County Judge
of —— county.

No. 50.

Notice to the Defendant.

See ante, p. 84.

To C. D., of ——, in the county of ——.

On the complaint of A. B., of ——, in said county, accompanied by an affidavit duly verifying the same, made to the undersigned, county judge of said county, that you did, on the —— day of ——, 18—, unlawfully make a forcible entry [*or*, did make entry in a peaceable manner] into the lands and premises of the said A. B., situate in —— aforesaid, to wit: [*describe premises*]; and that you did violently, forcibly, unlawfully, and with strong hand, eject and expel the said A. B. from his said lands and premises [*or*, hold the said A. B. out of possession of his said lands and premises], and that you do still unlawfully and forcibly hold and detain the said lands and premises, from the said A. B.; and that at the time aforesaid, the said A. B. had an estate of freehold [*or other estate*] in the said lands and premises, then and still subsisting in the same.

You will therefore take notice, that I have this day issued my precept, directed to the sheriff, or any constable of said county, commanding him to cause to come before me at my office, in ——, in said county, on the —— day of ——, 18—, at ten o clock in the forenoon, twenty-four inhabitants of the said county, duly qualified by law to serve as jurors, to inquire, upon their oaths, of the forcible entry [*or*, forcible holding out] aforesaid.

A. D. W.,
County Judge of —— County.

No. 51.

Affidavit of Service of Last Notice.

See ante, p. 84.

County of ——, *ss.* H. S., of ——, in said county, being duly sworn, says, That on the —— day of ——, 18—, he served upon C. D., of ——, in said county, a notice, of which the annexed is a copy, by delivering the same to him personally [*or*, by delivering the same to W. D., the wife of the said C. D., on the premises described in said notice; and that such service could not be made upon the said C. D., for the reason that after diligent inquiry, he could not be found; *or*, by affixing the same on the front door of the house, on the premises described in said notice, there being no person of proper age on the premises, and that such service could not be made upon the said C. D. for the reason that after diligent inquiry he could not be found.]

Sworn, *&c.* H. S.

No. 52.

Oath to Jury of Inquiry.

See ante, p. 85.

You and each of you do swear that you will well and truly inquire into the forcible entry [*or*, forcible holding out], complained of by A. B. against C. D., and a true inquisition thereof to make.

No. 53.

Oath to Witnesses.

See ante, p. 85.

You do swear that the evidence you shall give, touching the forcible entry [*or*, forcible holding out], complained of by A. B. against C. D., and now here to be inquired into, shall be the truth, the whole truth, and nothing but the truth.

No. 54.

Inquisition.

See ante, p. 85.

An inquisition taken before A. D. W., county judge of the county of ——, at his office in the town [*or*, city] of ——, in the county of ——, on the —— day of ——, 18—, by the oaths of E. F., G. H., *&c.* [*insert the names of the jurors who concur in the inquisition*].

The undersigned, inhabitants of the county of —— aforesaid,

qualified to serve as jurors, having been summoned to inquire of the forcible entry [*or*, forcible holding] hereinafter mentioned, and having appeared at the time and place aforesaid, before the said county judge, who then and there administered to the undersigned an oath well and truly to inquire into the forcible entry [*or*, forcible holding out] complained of by A. B. against C. D., and a true inquisition thereof to make. Whereupon, the undersigned jury so sworn, having then and there proceeded to make inquiry into the said forcible entry [*or*, said forcible holding out] complained of, and examined witnesses on oath administered by the said judge before him then and there made, now here make this their inquisition as follows, to wit:

The undersigned jury have found and hereby find and present, that A. B., of ——, aforesaid, long since had an estate of freehold [*or other estate, according to the fact,*] in that certain piece or parcel of land situate in the town of ——, aforesaid, and which is bounded and described as follows: [*insert description as in complaint*], and that the said A. B. was long since peaceably and lawfully possessed of the same, and that the estate and possession of the said A. B. so subsisted and continued until C. D., of ——, in said county, on the —— day of ——, at —— aforesaid, (*) did forcibly and unlawfully, and with strong hand, enter into the said land and premises and eject and expel him, the said A. B., therefrom; and the said A. B., so expelled from the said land and premises, from the said —— day of —— until the day of the taking of this inquisition, unlawfully and forcibly, and with strong hand, did keep out, and does yet keep out, to the great disturbance of the people of the State of New York, and contrary to the form of the statute in such case made; and that the estate of the said A. B., as aforesaid, still subsists therein.

And the said jurors, whose names are subscribed hereto, do, on the evidence produced before us, find the inquisition aforesaid true.

[*Signatures of jurors.*]

[*If the inquisition finds the entry in a peaceable manner, and that the possession was held by force, then proceed from the asterisk* (*) *as follows:*]—made entry in a peaceable manner into the said lands and premises, and after such entry did then and there violently, forcibly, and unlawfully, and with strong hand, hold the said A. B. out of possession of his said lands and premises; and the said A. B., from the said —— day of —— until the day of the taking of this inquisition, unlawfully and forcibly did keep out, and does yet keep out, of the possession of the land and premises aforesaid, to the great disturbance

of the people of the State of New York, and contrary to the form of the statute in such case made; and that the estate of the said A. B. as aforesaid still subsists therein.

And the said jurors, whose names are subscribed hereto, do, on the evidence produced before us, find the inquisition aforesaid true.

[*Signatures of Jurors*].

No. 55.

Award of Restitution, after Inquisition.

See ante, p. 86.

The People ex rel. A. B.
vs.
C. D.

The jury, summoned and sworn to inquire into the forcible entry [*or*, forcible detainer], complained of, by A. B. against C. D., having made their inquisition, by which the said C. D. is found guilty of the said forcible entry [*or*, forcible detainer], and the defendant, not having traversed the said inquisition within the time allowed by law, I, the undersigned, County Judge of the county of ——, before whom the said proceeding is pending, do hereby award restitution to the said A. B., of the premises described in the said inquisition; and do also hereby assess the costs and expenses of the said proceedings at the sum of —— dollars. Dated, *&c.*

A. D. W., County Judge.

No. 56.

Writ of Restitution.

See ante, p. 86.

The People of the State of New York, to the sheriff or any constable of the county of ——, greeting:

Whereas, A. B., of ——, in said county, did on the —— day of —— last, make complaint, in writing, duly verified, to the undersigned A. D. W., county judge of said county, that C. D., of —— in said county, on the —— day of ——, at —— aforesaid, did, *&c.* [*recite the complaint and the subsequent proceedings, and then add*:]

This is, therefore, to command you, to go to the premises aforesaid, and to cause the said A. B. to be restored and put into full possession of the said lands and premises according as he was seized or possessed thereof before the said entry.

And you are also further commanded to levy and collect the sum of —— dollars of the goods and chattels of the said C. D. (excepting

such goods and chattels as are by law exempt from levy and sale on execution), and to bring the money before me within sixty days from the date hereof, to render to the said A. B.

Given under my hand, the —— day of ——, 18—.

A. D. W., County Judge.

No. 57.

Traverse of Inquisition.

See ante, p. 86. Yates' Pl. 500. 1 Humph. Pr. 115.

C. D. *ads.* The People ex rel. A. B.

And afterwards, to wit: on the —— day of ——, at the town [*or*, city] of —— aforesaid, before the said A. D. W., county judge, as aforesaid, comes the said C. D., in his proper person, and having heard the said inquisition read to him, hereby traversing the same, (*) denies that he is guilty of the said supposed forcible entry [*or*, forcible holding out] in manner and form as in the said inquisition alleged, and of this, he, the said C. D., puts himself upon the country, and the said people do the like, *&c.* [*Or from the asterisk* (*) *proceed thus :*] alleges that he, the said C. D., or his ancestors, or those whose estate he has in the lands in said inquisition described, have been in quiet possession thereof for the space of three whole years next before the said inquisition found, and that his, the said C. D.'s interest therein, is not ended or determined, and of this he, the said C. D., puts himself upon the country, and the said people doth the like, *&c.*]

C. D.

No. 58.

Precept for Jury to try Traverse.

See ante, p. 87.

The People of the State of New York, to the sheriff or any constable of the county of ——, greeting :

You are hereby commanded to summon twelve good and lawful men of the town of ——, in said county, duly qualified to serve as jurors, and not exempt from serving on juries in courts of record, and in no wise of kin to A. B., of ——, in said county, or to C. D., of the same place, to come before the undersigned, county judge of said county, at his office in —— on the —— day of —— inst., to make a jury of the county, upon their oaths to try a certain traverse of an

inquisition, found upon the complaint of the said A. B., against the said C. D., and now pending before me, for a certain forcible entry [*or*, forcible holding out of possession], made by the said C. D., into the lands and premises of said A. B., in ——, aforesaid, against the form of the statute in such case made and provided; and that you make a list of the persons summoned, and certify and annex the same to this precept, and make return hereof to me.

Given under my hand, this —— day of ——, 18—.

A. D. W., County Judge.

No. 59.

Subpœna for Witnesses.

See ante, p. 89.

County of ——, ss. The people of the State of New York, to B. F., R. S., &c., greeting:

We command you, and each of you, that all business and excuses being laid aside, you and each of you be and appear in your proper persons, before the undersigned, county judge of said county, at his office in said county, on the —— day of ——, to testify before a petit jury [*or*, a jury of inquiry], touching a certain forcible entry alleged to have been made into certain lands and premises of A. B., by C. D., and wherein it is alleged the said A. B. has a freehold estate, on the part of the said A. B. Hereof fail not at your peril.

Witness my hand this —— day of ——, 18—.

A. D. W., County Judge.

No. 60.

Oath of Jurors.

See ante, p. 87.

You and each of you do swear that you will well and truly hear, try and determine, the traverse of an inquisition found upon the complaint of A. B., against C. D., for a certain forcible entry [*or*, forcible detainer], made by the said C. D. into the lands and premises of the said A. B., and a true verdict give according to the evidence.

No. 61.

Oath to Witnesses.

See ante, pp. 87, 89.

You do swear that the evidence you shall give touching the forcible

entry [*or*, forcible detainer] complained of by A. B. against C. D., on the traverse of the inquisition found upon the said complaint, shall be the truth, the whole truth and nothing but the truth.

No. 62.

Award of Restitution after Verdict.

See ante, p. 88.

[*Title as No.* 55.]

The jury summoned and sworn to hear, try, and determine the forcible entry [*or*, forcible detainer], complained of by A. B. against C. D., having rendered their verdict, by which the said C. D. is found guilty of the said forcible entry [*or*, forcible detainer], I, the undersigned, county judge of the county of ——, before whom the said proceeding is pending, do hereby award restitution to the said A. B., of the premises described in the complaint of the said A. B.; and do also hereby assess the costs and expenses of the said proceedings at the sum of —— dollars. Dated, *&c.* A. D. W., County Judge.

No. 63.

Writ of Restitution.

See ante, p. 88.

[*Same as in No.* 56, *reciting the complaint, and all the subsequent proceedings.*]

No. 64.

Certiorari to Remove Proceedings.

See ante, p. 90.

The People of the State of New York, to A. D. W., county judge of the county of ——, greeting:

Whereas, we have understood, on the complaint of C. D., that lately before you a certain inquisition was found against him, for, *&c.* [*state the finding of the jury*]. And we being willing, for certain reasons, that the said inquisition, and all other proceedings concerning the same before you remaining, should be certified and returned by you into our Supreme Court of judicature, before our justices thereof, do command you that you certify and return the same unto our justices of the Supreme Court of judicature, with all the proceedings thereto appertaining, at the next term of this court, to be held at ——, on the —— day of —— next, so that our said justices may further act

thereon, as of right and according to law ought to be done; and have then there this writ.

Witness, C. L. A,, Justice of the Supreme Court,
at —— the —— day of ——, 18—.
N. B. M., Clerk.

L. P. C., Attorney.

[*Endorsed :*] "On the application of L. P. C., attorney for C. D., and upon his affidavit, dated the —— day of ——, 18—, I allow the within writ of certiorari to issue."

C. L. A., Justice of the Supreme Court.

No. 65.

Bond on allowance of Certiorari.

See ante, p. 90.

Know all men by these presents, That, *&c.*, [*in the usual form; the obligee is the complainant; there must be two sureties, or, in case the defendant is absent, three sureties; penalty, not less than one hundred dollars.*]

The condition of the above obligation is such, that if C. D. shall appear at the return of a certain writ of certiorari, issued out of the Supreme Court of this State, tested on the —— day of ——, 18—, and returnable on the —— day of ——, and directed to A. D. W., county judge of said county, commanding him to certify the inquisition and all other proceedings concerning a certain forcible entry alleged to have been made into certain lands and premises of A. B., the obligee above named, by the said C. D.; and if the said C. D. shall answer to the inquisition found against him, as aforesaid, and abide such order and judgment as the said Supreme Court shall make in the premises, and pay all costs that shall be awarded against him, then the above obligation to be void, otherwise to remain in full force and virtue.

[*Signatures and Seals of Obligors.*]

Signed, sealed and delivered in presence of }
F. H.

[*Add acknowledgment, and affidavit of sureties in the usual form, —see No. 290; also, approval of sureties, as follows :*]

I approve of the sureties in the above bond, and of the sufficiency thereof.

C. L. A.,
Justice of the Supreme Court.

No. 66.

Answer or Return to Certiorari.

See ante, p. 90.

The answer or return of A. D. W., county judge of the county of ——, to the writ of certiorari hereto annexed.

By virtue of, and in obedience to, the writ of certiorari hereto annexed, and to me directed, I do hereby certify and return to the justices of the Supreme Court, that on the —— day of —— last, the complaint of A. B., of ——, in said county, duly verified, was presented to me, which complaint, with the affidavit verifying the same, is as follows: [*insert the complaint, &c.*]

That I did thereupon, *&c.* [*proceed in the same manner, and make return of all the proceedings down to the time of the service of the writ of certiorari.*]

All of which I do hereby certify and return as within I am commanded.

In testimony whereof I have hereunto set my hand and seal, this —— day of ——, in the year one thousand eight hundred and ——.

A. D. W. [*Seal*].

No. 67.

Traverse in the Supreme Court.

See ante, p. 91.

[*Same substantially as in No.* 57, *ante.*]

No. 68.

Judgment Record on Certiorari.

See ante, p. 91.

[*Same substantially as in No.* 184, *to the asterisk* (*), *and then continue*]: sent to A. D. W., county judge of the county of ——, their writ of certiorari close in these words to wit: [*insert writ.*]

At which day and place in the return of the said writ mentioned, before the justices aforesaid, comes the said C. D., by L. P. C., his attorney, and the said A. D. W., county judge, aforesaid, now here, makes return to the said writ in the words and figures following, that is to say: [*insert copy of return in full.*]

And the said C. D., not having traversed the inquisition mentioned in said return, day is given to him for that purpose, to wit, the ——

day of —— 18—, at which last mentioned day, the said C. D. traverses the said inquisition as follows: [*insert the defendant's traverse.*]

It is thereupon ordered by the Supreme Court, that the said traverse be tried at the Circuit Court appointed to be held at the Court House in ——, on the —— day of ——, 18—.

Afterwards, to wit, on the day and at the place last aforesaid, before C. L. A., Esq., one of the justices of said court, come as well the above-named C. D., as the above-named A. B.; and the jurors summoned to try the said traverse being called also come; who to speak the truth of the matters above contained being duly sworn, say upon their oath, that the said C. D. is guilty [*or*, not guilty] of the forcible entry [*or*, forcible detainer] as by the complaint of the said A. B. is alleged.

Whereupon the said A. B. prays judgment of restitution, with costs, and that a writ or warrant may be issued by the said court, restoring to him the possession of the premises aforesaid.

Judgment signed the —— of —— A. D., 18—. N. B. M., Clerk.

It is therefore considered that the said A. B., recover against the said C. D., —— dollars for his costs and charges by him laid out and expended in and about his defence to the said writ of certiorari, adjudged to him by the court now here, with his assent, and that he have execution therefor. And it is further considered that the said A. B. be restored to the possession of the premises described in the proceedings aforesaid.

[*If judgment is for the defendant, then proceed thus:*]

It is therefore considered that the inquisition aforesaid be and the same is hereby quashed. And it is further considered that the said C. D. recover against the said A. B. —— dollars, for his costs and charges by him laid out and expended in and about the prosecution of the said writ of certiorari, adjudged to him by the court now here, with his assent, and that he have execution therefor, *&c.*

No. 69.

Writ of Restitution.

See ante, p. 91.

The People of the State of New York, to the sheriff of the county of —— greeting:

Whereas, we lately caused to be removed by our writ of certiorari

into our Supreme Court of judicature, before our justices' therein, certain proceedings had before A. D. W., county judge of said county.

And thereupon it was considered, in our said Supreme Court, before our justices' aforesaid, that the said A. B., be restored to the possession of the following described lands and premises [*insert description*].

Now, therefore, we command you, that you forthwith restore the said A. B. to the full possession of the said premises; and how you shall have executed this our writ, make appear to our justices of our Supreme Court at, *&c.*, on, *&c.*; and have you then there this writ.

Witness, *&c.* [*in usual form.*]

J. G., Attorney. N. B. M., Clerk.

CHAPTER V.

FORMS ON HABEAS CORPUS AND CERTIORARI.

No. 70.

Petition for Habeas Corpus, or Certiorari.

See ante, p. 105.

To the Supreme Court of the State of New York: [*or*, To Hon. P. P., Justice of the Supreme Court; *or other officer to whom application is to be made.*]

The petition of A. B., respectfully shows: That he is now a prisoner, confined in the custody of C. D., sheriff of the county of ——, in the county jail in the village [*or*, city], of ——, in said county, for a supposed criminal offense, to wit: [*here state the offense.*]

Your petitioner further shows that such confinement is by virtue of a warrant, a copy of which is hereto annexed [*or*, and your petitioner avers that by reason of his being removed or concealed, before this application, a demand of a copy of the warrant, or process by virtue of which he is confined, could not be made. *Or thus:* And your petitioner avers, that prior to this application, a demand of a copy of the warrant or process by virtue of which he is confined, was made of the said C. D., and the legal fees therefor tendered to him; and that such copy was refused.]

And your petitioner further shows: That to his best knowledge and belief he is not committed or detained by virtue of any process issued by any court of the United States, or any judge thereof, [in a case where such courts or judges have exclusive jurisdiction under the laws

of the United States, or have acquired exclusive jurisdiction by the commencement of a suit in such courts], or by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment, or decree.

And your petitioner states and shows that he is advised by his counsel, O. F., Esq., residing at ——, and verily believes, that his imprisonment is illegal, and that such illegality consists in this: [*state in what the alleged illegality consists.*]

Wherefore your petitioner prays a writ of habeas corpus [*or*, certiorari], to the end that he may be bailed or discharged from custody.

Dated, *&c.* A. B.

O. F., Attorney.

County of ——, ss. A. B., the above named petitioner, being duly sworn, says: That the foregoing petition is true to his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true. A. B.

Sworn to, *&c.*

No. 71.

Another Form of Petition—by Third Party.

To the Supreme Court, *&c.* [*as in last form*].

The petition of E. F. respectfully shows: That A. B. [*or if his name is not known, describe him*] is imprisoned, or restrained of his liberty, by —— [*state the name of the officer or person by whom he is restrained, if known, and if not known, describe him*] and that the said A. B. is so confined or restrained, at ——. [*state the place where the party is confined*].

And your petitioner further shows, that, according to the best of the knowledge and belief of your petitioner, the cause or pretense of the aforesaid confinement, or restraint, of the said A. B. is as follows: [*state cause of detention.*]

And your petitioner further shows, *&c.* [*as in last form, including verification, varying it to suit an application made by a third person on behalf of the person imprisoned*].

No. 72.

Another Form, in cases of Infants.

See ante, pp. 105, 126, and cases cited.

To the Supreme Court of the State of New York:

The petition of A. B., of ——, in the county of ——, and State of New York, respectfully shows:

That, *&c.* [*Here state the matters alleged in the last form, so far as*

the same are applicable; and also all the facts and circumstances in relation to the ability of both parents—and all the facts and circumstances proper to be considered in determining the custody and disposition of an infant. And make the prayer in the petition according to the relief required.]

No. 73.

Writ of Habeas Corpus.

See 2 R. S., 565, sec. 27; and ante, p. 107.

The People of the State of New York: To C. D., Sheriff of, *&c.*, [*or other person in whose custody the party is*].

[SEAL.] We command you that you have the body of A. B., by you imprisoned, and detained as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said A. B. shall be called, or charged, before our justices of our Supreme Court, *&c.*, [*or*, before A. D. W., county judge, *&c. as the case may be*], at, *&c.*, on, *&c.*, [*or*, immediately after the receipt of this writ], to do and receive what shall then and there be considered concerning the said A. B. And have you then there this writ.

Witness C. L. A., one of the justices of our Supreme Court, at ——. the —— day of ——, 18—.

N. B. M., Clerk.

O. F., Attorney.

How writ Endorsed.

See ante, pp. 108, 109.

Allowed, the —— day of ——, 18—, [*or*, allowed on application of the attorney-general, *or*, district attorney, this —— day of —— 18—. *Or, if the writ is directed to any party other than a sheriff, coroner, constable, or marshal, and the charges for bringing up the prisoner are required by the court or judge to be paid by the petitioner, then add to the allowance, the following:* And the charges for bringing up such prisoner, amounting to —— dollars, are hereby required to be paid by the petitioner on whose application this writ is issued.]

C. L. A., Justice of the Sup. Court.

No. 74.

Writ of Certiorari.

See 2 R. S. 565, sec. 28; ante, p. 107.

The People of the State of New York: To C. D., sheriff of, *&c.*,

[*or other person in whose custody the party is*]. We command [SEAL.] you that you certify fully, and at large, to our justices of our Supreme Court [*or*, to A. D. W., county judge, *&c., as the case may be*], at, *&c.*, on, *&c.*, [*or*, immediately after the receipt of this writ], the day and cause of the imprisonment of A. B., by you detained, as it is said, by whatsoever name the said A. B., shall be called or charged. And have you then and there this writ.

Witness, *&c.* [*as in last form.*]

N. B. M., Clerk.

O. F., Attorney.

[*Endorsement as in last form.*]

No. 75.

Bond on Serving Writ.

See ante, p. 110.

Know all men by these presents, That I, E. F., farmer, of the town of —— in the county of ——, am held and firmly bound unto C. D., sheriff of said county, in the penal sum of —— dollars [*penalty, double the amount of the sum for which the prisoner is detained, if detained for any specific sum, and if not, then for one thousand dollars*], to be paid to the said C. D., or to his certain attorney, executors, administrators or assigns, for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated the —— day of —— 18—.

Whereas, A. B. is now confined as a prisoner in the custody of the said C. D., sheriff, as aforesaid, and a writ of habeas corpus has been issued by the Supreme Court [*or*, by A. D. W., Esq., county judge of said county], to inquire into the cause of his detention, directed to the said sheriff.

Now, therefore, the condition of this obligation is such, that if the said E. F. shall pay to the said sheriff the charges for carrying back the said A. B., if he shall be remanded on the said habeas corpus, and if the said A. B., shall not escape by the way, either in going to, or returning from, the Court House in the village of —— [*or*, the office of said county judge, *or other place where the prisoner is required to be taken*], then this obligation to be void, otherwise to remain in full force and virtue. E. F. [*Seal.*]

Sealed and delivered in presence of

S. T.

No. 76.

Petition showing that party may be carried out of the State, or may suffer some injury before writ can issue.

See ante, p. 111.

To the Supreme Court, *&c.* [*proceed, substantially as in No.* 70, *to the end, and then as follows :*]

And your petitioner further shows, that the said G. H., in whose custody the said A. B. is, has threatened to carry the said A. B. out of this State, and has told several persons, publicly, that such was his intention. That your petitioner had a conversation with said G. H., this morning, in which he informed your petitioner that he should leave immediately with said A. B., for the State of ——, and that your petitioner or any other person, had no power to prevent him from doing so, *&c.* [*setting forth the facts showing the illegal confinement or custody, and that the party confined will be carried out of the State, or suffer some irreparable injury before he can be relieved by habeas corpus or certiorari.*] E. F.

O. F., Attorney.

[*Add verification as in No.* 70.]

Affidavit to accompany the above Petition.

County of —— ss.

R. S., of ——, in said county, being duly sworn, deposes and says, He is acquainted with A. B., and G. H., mentioned in the annexed petition. That, *&c.* [*setting forth facts in corroboration of the facts stated in the petition.*] R. S.

Sworn to, *&c.*

No. 77.

Warrant under the last form.

See ante, p. 111.

To C. D., sheriff of the county of —— [*or*, to any constable of the county of ——],

Whereas, E. F. has applied to me for a warrant to take A. B., alleged to be illegally confined by [*or*, in the custody of] G. H.; and whereas, it appears from the proofs before me on such application, that, *&c.*, [*recite the facts showing the illegal confinement, or custody, and that the party will probably be carried out of the State, or that he will suffer some irreparable injury before he can be relieved*].

From which facts it satisfactorily appears to me that the said A. B. is held in illegal confinement [*or*, custody], by the said G. H., and

that there is good reason to believe that he will be carried out of the State [*or*, that he will suffer some irreparable injury], before he can be relieved by the issuing of a habeas corpus, or certiorari.

These are, therefore, in the name of the people of the State of New York, to authorize and command you forthwith to take the said A. B. (*a*) and bring him before me, to be dealt with according to law.

Given under my hand and seal, at the village of ——, in said county, this —— day of ——, A. D. 18—.

[*Signature and Seal of Judge.*]

O. F., Attorney.

No. 78.

Attachment for Disobedience to Writ.

See ante, p. 112.

To the Sheriff of the county of ——.

It appearing satisfactorily to me on oath that G. H., to whom a writ of habeas corpus [*or*, certiorari] was directed and delivered, commanding him to bring before me A. B., in the said writ named, has neglected [*or*, refused] to obey the said writ according to the command thereof, by not producing the said A. B. before me, and also by not making a return [*or*, a full and explicit return] to such writ within the time limited by law; and no sufficient excuse having been shown for such neglect [*or*, refusal];

These are therefore to authorize and command you, in the name of the people of the State of New York, forthwith to arrest the said G. H., and to bring him immediately before me at my office in the village of ——, in said county.

Given under my hand and seal, at —— aforesaid, on the —— day of ——, 18—. [*Signature and Seal of Judge.*]

O. F., Attorney.

No. 79.

Commitment for Disobedience to Writ.

See ante, p. 113.

To the Sheriff of the county of ——.

Whereas, G. H. has been brought before me on a warrant issued

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(*a*) The warrant may also direct the arrest of the party illegally confining the prisoner, where the facts justify it. *See* 2 *R. S.* 572, *sec.* 66, *ante, p.* 112.

by me stating that the said G. H., *&c.* [*recite the warrant, as in last form*].

And whereas the said G. H. still refuses to obey the said writ of habeas corpus, by producing the body of the said A. B., as therein required, and by not making a return [*or*, a full and explicit return] to such writ of habeas corpus [*or*, certiorari].

These are therefore to authorize and command you, in the name of the people of the State of New York, forthwith to convey the said G. H. to the jail of said county, and there commit him to close custody in such jail, without being allowed the liberties thereof, there to remain until he shall make return to the writ in such warrant mentioned, and also comply with my order this day made, wherein the said G. H. *&c.* [*state what the order is in relation to the person for whose relief the writ has been issued*].

Given under my hand and seal, at, *&c.*, the —— day of ——, 18—. [*Signature and Seal of Judge.*]

O. F., Attorney.

No. 80.

Precept for party Illegally Confined or Restrained.

See ante, p. 113.

To the Sheriff of the county of ——.

Whereas, a writ of habeas corpus has heretofore been issued by me directed to G. H., in which he was commanded to have the body of A. B., by him imprisoned and detained as it was said, together with the time and cause of such imprisonment, and which writ has been duly served upon the said G. H.; and whereas, the said G. H. has neglected [*or*, refused] to produce the body of the said A. B. according to the command of said writ; and for which neglect [*or*, refusal] an attachment has been issued against the said G. H.

These are therefore to command you, in the name of the People of the State of New York, forthwith to bring before me the said A. B., at my office in the village of ——, in said county.

O. F., Attorney. [*Signature and Seal of Judge.*]

No. 81.

Return to Habeas Corpus.

See ante, p. 114.

The return of C. D., Sheriff of the county of ——, to the writ of habeas corpus hereto annexed.

In obedience to the writ of habeas corpus hereto annexed, I do hereby certify and return to the Supreme Court [*or other court or officer allowing the writ*], (*) that before the coming of the said writ to me, to wit, on the —— day of ——, 18—, at the village [*or*, city] of ——, the said A. B., mentioned in said writ, was placed in my custody by virtue of an execution [*or*, commitment] issued, *&c.* [*state the cause of imprisonment*], a copy of which warrant is hereto annexed; and that the said A. B. is now in my custody under the said execution [*or*, commitment].

All which I certify, and have here the body of the said A. B., as by the said writ I am commanded.

Dated, *&c.* C. D., Sheriff.

Another Form—Party not in his Custody.

[*Same as last form to the asterisk* (*) *and then proceed:*] That neither at the time of the allowance of the said writ, nor at any time since, was the said A. B. in my custody or restrained by me of his liberty; wherefore I cannot have his body before the said court [*or*, officer] as by the said writ I am commanded.

C. D., Sheriff.

[*Unless the person making the return is a sworn public officer and shall make such return in his official capacity, it must be verified substantially as follows:*]

County of ——, ss. G. H., above named, being duly sworn says, that the above return, subscribed by him, is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

No. 82.

Notice to Party interested, of the Time and Place writ is Returnable.

See ante, p. 115.

To A. G., [*or*, To O. F. D., Esq., Attorney for A. G.]

Sir,—You will please take notice that a writ of habeas corpus [*or*, certiorari] has been issued by the Supreme Court [*or other court or officer as the case may be*], to inquire into the cause of the imprisonment of A. B., now confined in the jail of —— county, under process in which you have, or claim [*or*, the said A. G. has or claims] some interest; and that the said writ is made returnable before the said court [*or*, officer], at the Court House [*or*, at his office], in the village of ——, in said county, on the —— day of —— instant, at 10 o'clock A. M.

Dated, *&c.* Yours, &c.,

L. P. C., Attorney for A. B.

No. 83.

Like Notice to District Attorney.

See ante, p. 115.

To A. L. M., Esq., District Attorney of the county of ——.

SIR,—You will take notice that a writ of habeas corpus [*or*, certiorari] has been issued by the Supreme Court [*or other court, or officer, as the case may be*], to inquire into the cause of the imprisonment of A. B., now confined in the jail of said county under a criminal accusation; and that the said writ is made returnable before the said court [*or*, officer], at the Court House [*or*, at his office], in the village of —— in said county, forthwith [*or*, on the —— day of —— inst., at 10 o'clock A. M.]

Dated, *&c.*

Yours, &c.

L. P. C., Attorney for A. B.

No. 84.

Writ of Discharge.

See ante, p. 117.

To the Sheriff of the county of ——.

It appearing on the return of the writ of habeas corpus [*or*, certiorari] allowed by me, that A. B. is illegally imprisoned [*or*, detained] by you, I do therefore command you, forthwith to discharge him from your custody.

Given under my hand and seal this —— day of —— 18—.

[*Signature and Seal of Officer.*]

No. 85.

Order directing Prisoner to be Remanded.

See ante, pp. 116 to 125.

Whereas, A. B. has been brought before me on a writ of habeas corpus, directed to you, for the purpose of inquiring into the cause of his imprisonment. And whereas, it appears from the return to said writ that the said A. B. is legally detained in custody, by virtue of an execution issued upon a final judgment rendered in the Supreme Court [*or other court*], in favor of A. G., as plaintiff, against the said A. B, as defendant [*or*, by virtue of a commitment for a contempt issued by the —— Court, in which commitment the said contempt is specially and plainly charged, the said court having authority to commit for the contempt, so charged; *or otherwise as the case may be.*]

It is, therefore, ordered that the said A. B. be, and he is hereby, remanded to his former imprisonment under the execution [*or*, commitment] aforesaid. Dated, *&c.*

[*Signature of Judge.*]

No. 86.

Traverse or Denial of Return.

See ante, p. 121.

Before Hon. C. L. A., *&c.*

In the matter
of
A. B.

The said A. B., in answer to the return of C. D., sheriff of the county of ——, denies, that, *&c.* [*set forth the allegations which the defendant wishes to deny*].

And the said A. B., in further answering said return, shows: That, *&c.* [*allege the facts, to show either that the imprisonment or detention is unlawful, or that the party is entitled to his discharge*].

A. B.

County of ——, ss. A. B., above named, being duly sworn, says, that he has read the above answer, subscribed by him, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

Sworn, *&c.* A. B.

No. 87.

Bail Bond.

See ante, pp. 130, 137.

County of ——, ss.: Be it remembered that on the —— day of ——, 18—, J. S., of ——, in said county, and J. N. farmer, and S. S., merchant, of the same place, personally appeared before [*name of officer*], and severally and respectively acknowledged themselves to be indebted to the People of the State of New York in the sum of —— dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

Whereas, the above named J. S. is in the custody of the sheriff of

said county under a commitment from ——, a justice of the peace for the town of ——, in said county, from which commitment it appears that the said J. S. is charged with the crime of grand larceny, committed within said county.

Now, therefore, the condition of this recognizance is such, that if the said J. S. shall personally appear at the next Court of Sessions [*or*, Court of Oyer and Terminer], to be held in and for said county of —— then and there to answer to an indictment to be preferred against him for the said offense, and to do further and receive what shall, by the said court, be then and there enjoined upon him, and shall not depart the said court without leave; then this recognizance to be void; otherwise to remain in full force and virtue. [*Signatures.*]

Taken, subscribed and acknowledged before me, by the said J. S., J. N. and S. S., the day and year first above-written.

C. L. A., Justice of Sup. Court.

No. 88.

Order on Return to Certiorari, that the Prisoner be Bailed.

See ante, p. 137.

It appearing to me upon the return to the writ of certiorari issued by me on the —— day of ——, 18—, that A. B. in whose behalf the said writ was issued, is detained in the custody of the sheriff of the county of ——, under a commitment in which the said A. B. is charged with the offense of grand larceny, and that the said A. B. is entitled to bail; it is therefore ordered by me, that the said A. B. be held to bail for his appearance at the next court of sessions [*or*, court of oyer and terminer], to be held in and for the county of ——, in the sum of —— dollars.

And it is further ordered by me, that upon such bail being entered into, in confirmity to this order and the provisions of law, that the said A. B. be discharged. [*Signature of Judge.*]

No. 89.

Recognizance under the last Form.

See ante, p. 137.

[*Same substantially as in No.* 87; *and for forms of Affidavits of Sureties, see No.* 290.]

No. 90.

Affidavit on which to apply for a Certiorari.

See ante, p. 139; and 3 Park. Cr. R. 600.

County of ——, ss. R. C., being duly sworn, says: He is the

district attorney of said county; that on or about the —— day of——, 18—, a writ of habeas corpus was allowed by —— [*officer issuing the writ*], and returnable before him on the —— day of ——, 18—, at ten o'clock, A. M. of that day, for the relief of one J. C., and to inquire into the cause of his detention. That at the time last aforesaid, a return was made to said writ, to which return a traverse was interposed. That on the said return, deponent was heard before the said justice [*or other officer*], and on the —— day of ——, instant, an order was made by said justice, under which the said J. C., the party named therein, was discharged from custody, and a final adjudication was thereupon made by said justice; and further deponent says not.

Sworn, *&c.* [*Signed by Deponent.*]

No. 91.

Certiorari to Remove Proceedings into the Supreme Court.

See ante, p 139; and 2 Park. Cr. R. 650; and see 3 Id.; 533 Id. 600.

The people of the State of New York, to G. D., Esq., one of the justices of the Supreme Court [*or*, to A. D. W., Esq., county judge of the county of ——], greeting:

Whereas, we have been informed by the complaint of R. C. M., [*Seal.*] district attorney of the county of ——, that certain proceedings were had before you, on behalf of J. C., lately convicted of a misdemeanor in our court of oyer and terminer [*or*, court of sessions], of the county of ——, and imprisoned, pursuant to sentence thereon, in the common jail of said county, whereby an order was made by you on the —— day of ——, 18—, allowing a writ of habeas corpus, tested of that day and directed to E. L., sheriff of said county and keeper of the common jail thereof, commanding him to bring before you the body of the said J. C., together with the cause of his imprisonment at the ——, in the city [*or*, village] of ——; and whereby a certain other order was made by you in said proceedings, upon the return of said writ on the —— day of ——, in the year aforesaid, discharging the said J. C., from his imprisonment, aforesaid; and we being willing for certain reasons, to be certified of the said proceedings, writs and orders, and all things appertaining thereto, do command you that you certify the same, with all things appertaining thereto, unto our justices of our Supreme Court, at the City Hall [*or*, Court House], in ——, on the —— day of —— next [*time and place of the next general term*], under your seal, as fully and amply as the same remain before you, that our

said justices may cause to be done further thereupon what of right and according to law ought to be done; and have you then there this writ.

Witness, S. B. S., Esq., justice of the Supreme Court, at the, *&c.*, the —— day of ——, one thousand, eight hundred and ——.

C. A. D., Clerk.

R. C. U., District Attorney of —— county.

[*Endorsed:*] On the application of R. C. U, district attorney of —— county, upon his affidavit, dated the —— day of ——, 18—, I allow the within writ of certiorari to issue; and let said affidavit be filed in the office of the clerk of —— county. Dated, *&c.*

W. R., Justice of Supreme Court.

No. 92.

Answer or Return to Writ of Certiorari.

See ante, p. 139, and 2 Park. Cr. R. 652.

The answer or return of G. D., one of the justices of the Supreme Court [*or*, county judge of the county of ——] to the writ of certiorari hereto annexed.

By virtue of, and in obedience to, the writ of certiorari hereto annexed, and to me directed, I do hereby certify and return to the justices of the Supreme Court, that on the —— day of —— last, the petition of J. C. was presented to me, duly verified, which petition is as follows: [*insert petition.*]

That I did thereupon, pursuant to the prayer of said petitioner, order and allow a writ of habeas corpus to issue to E. L., sheriff of said county of ——, commanding him to have before me the body of the said J. C., together with the cause of his imprisonment, at the City Hall [*or*, Court House, *or*, at my office], in the city [*or*, village] of ——, on the —— day of ——, 18—; at which last mentioned time and place, appeared before me the said sheriff, together with the said J. C., and also the district attorney of said county, on behalf of the people, and the said sheriff did then and there make the following return to the said writ: [*insert sheriff's return.*]

And thereupon the said J. C. did traverse under oath the said return of said sheriff, which traverse is as follows: [*insert the prisoner's traverse.*]

Whereupon I did then and there proceed to hear the allegations and proofs produced in behalf of said prisoner, and also in behalf of said people; and being satisfied upon such hearing that, *&c.*, [*state the*

conclusions of the judge], I did thereupon [for the reasons stated in the annexed opinion] make and endorse upon said writ of habeas corpus, an order as follows: [*insert the order or decision made.*]

All of which I do hereby certify, and return as within I am commanded.

In testimony whereof I have hereunto set my hand and seal, this —— day of —— in the year one thousand eight hundred and —

G. D. [*seal.*]

SECTION II.

Writ of Habeas Corpus to bring up person to testify.

No. 93.

Affidavit for habeas corpus ad testificandum.

See ante, pp. 144, 145.

[*Title of the action, or proceeding.*]

County of —— ss. A. B., the plaintiff [*or*, defendant] above-named, being duly sworn, says: That this action is brought upon a promissory note executed by, *&c.* [*describe cause of action*]. That the defence to said action is as follows: [*set forth briefly the nature of the defence.*]

And deponent further says, that E. F., who is now a prisoner in the custody of the sheriff of the county of —— under execution upon final judgment in favor of K. L., is and will be a material witness for this deponent on the trial of the said action, as he is advised by J. G., Esq., residing at ——, in said county, his counsel in this action, and verily believes; and that he cannot safely proceed to the trial of this action without the testimony of the said E. F., as he is also advised by his said counsel and verily believes.

And deponent further says: That this action is noticed for trial at a Circuit Court to be held at the Court House in ——, in the county of ——, on the —— day of ——, instant.

Sworn, *&c.* A. B.

No. 94.

Writ of Habeas Corpus ad testificandum.

See ante, p. 145.

The People of the State of New York, to the sheriff of the [*Seal.*] county of —— greeting:

We command you that you have the body of E. F., detained in our prison under your custody, as it is said, under safe and secure conduct,

before our Supreme Court, at a Circuit Court [*or*, before our county court of the county of ——] to be held at the Court House in ——, on the —— day of —— inst., by ten o'clock A. M. of that day [*or*, forthwith], then and there to testify the truth, according to his knowledge, in a certain action, now depending in the said court, then and there to be tried between A. B., plaintiff, and C. D., defendant, on the part of the plaintiff [*or*, defendant]. And immediately after the said E. F. shall then and there have given his testimony, in the said action, that you return him, the said E. F., to our said prison under safe and secure conduct. And have you then there this writ.

Witness, C. L. A., one of the justices of our said court, the —— day of ——, 18—.

N. B. M., Clerk.

L. P. C., Attorney.

[*Endorsed:*] Allowed this —— day of ——, 18—.

C. L. A., Justice Sup. Court.

No. 95.

Bond on service of Writ.

See ante, p. 146.

[*Same as in No. 75, except in reciting the character of the writ.*]

CHAPTER VI.

FORMS IN RESPECT TO IDIOTS, LUNATICS, HABITUAL DRUNKARDS, &c.

No. 96.

Petition for a Commission of Lunacy.

See ante, p. 154.

In Supreme Court [*or other court*].

In the matter of A. T. R., a supposed Lunatic.

To the Supreme Court of the State of New York [*or*, To the county court of the county of ——, *or*, To the court of Common Pleas of the city and county of New York].

The petition of H. R., of the town of ——, in the county of ——, respectfully shows: That A. T. R., who resides in said town of ——,

farmer, and who is the father of your petitioner, now is, and for the space of two or more years last past has been, so far deprived of his reason and understanding, as to be altogether unfit and unable to govern himself or to manage his affairs, as will more fully appear by the affidavits hereto annexed.

[*If the supposed Lunatic is a non-resident, then proceed:* And your petitioner further shows, that the said A. T. R. is the owner of property situated within this State.]

Your petitioner, therefore, prays that a commission in the nature of a writ de lunatico inquirendo may issue out of, and under, the seal of this court, to inquire of the lunacy of the said A. T. R., and to be directed to such persons as to the court may seem proper.

L. P. C., Attorney. H. R.

State of New York, }
County of ——, ss. } On this —— day of ——, 18—, before me personally appeared the above named H. R., and made oath that he has read [*or*, heard read] the above petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and that as to those matters he believes it to be true.

A. B. L., Justice of the Peace.

Affidavits Annexed.

[*Title as in No.* 96.] County of ——, ss. R. T., of ——, in said county, being duly sworn says: That he is well acquainted with A. T. R., of said town of ——, and has been acquainted with him for ten years or more last past; that the said A. T. R. for the last six years has at times been more or less affected by an alienation of mind, rendering him unfit, for the time being, to have the government of himself or the management of his affairs.

And deponent further says: That he has seen the said A. T. R. frequently within the last two years; and that, according to the best of his judgment and belief, the said A. T. R. has been, during the whole of that time, of unsound mind and understanding.

And deponent further says, that the language and actions of the said A. T. R., during the past two years, have been those of an insane person. That, *&c.* [*set out the acts and language of the party indicating insanity, or unsoundness of mind, &c.*] And deponent believes

that the said A. T. R. is still of unsound mind and understanding, and unfit for the government of himself, or the management of his affairs.

Sworn, *&c.* R. T.

[*Title as in No.* 96.] County of ——, ss. G. A. being duly sworn, says: That he is a practicing physician, and resides in the town of ——, in said county; that he is acquainted with A. T. R. of said town of ——, and has attended him several times professionally within the last year, and has seen him frequently within the past two years.

And deponent further says: That the said A. T. R., in the opinion of deponent, is of unsound mind and understanding, and wholly unfit for the government of himself, or the management of his property; and that he has been in that state or condition for two or more years last past. That the grounds of deponent's opinion and belief, are as follows: [*set out reasons for the opinion, and the facts and circumstances showing insanity, or unsoundness of mind, in the party.*]

Sworn, *&c.* G. A.

No. 97.

Petition for Commission on the Ground of Extreme Old Age.

See ante, pp. 153, 154.

[*Title, &c., as in No.* 96.] The petition of H. R., of the town of ——, in the county of ——, shows: That he is the nephew and one of the next of kin of J. D., of the town of ——, in said county; that the said J. D. is of the age of ninety years and upwards: that by reason of such extreme age, she is so far deprived of her reason and understanding as to be altogether unfit and unable to govern herself, or to manage her affairs, as will more fully appear by the affidavits hereto annexed. [*Conclude as in No.* 96.]

No. 98.

Petition for a Commission of Idiocy.

See ante, pp. 152, 154.

[*Title as in No.* 96.]

The petition of H. M., of the town of ——, in said county, shows: That he is a brother of L. M., of the town of ——, in said county. That the said L. M. has been from the time of his birth, and still is, wholly deficient in reason and understanding, and to all intents and purposes an idiot; as, by the affidavits hereto annexed, will fully appear.

Your petitioner therefore prays, that a commission in the nature of a writ de idiota inquirendo may issue to inquire of the idiocy of the said L. M., directed to such persons as to the court may seem proper.

[*Verification as in No.* 96.] H. M.

No. 99.

Petition for a Commission against an Habitual Drunkard.

See ante, pp. 153, 154.

[*Title, &c., as in No.* 96.]

The petition of J. P., of the town of ——, in the county of ——, shows: That O. P., aged about thirty years, who resides in said town, and who is a brother of your petitioner, is an habitual drunkard, and has been such for six months, or more, last past.

And your petitioner further shows: That about one year ago, the said O. P. began the use of intoxicating drinks, and shortly thereafter became quite intemperate. That for the six months last past he has been an habitual drunkard, and in consequence thereof, has, during the whole of that time, been incapable of conducting his own affairs, and is still in the same condition; as, by reference to the affidavits hereto annexed, will more fully appear.

Your petitioner therefore prays that a commission may issue, to inquire of the habitual drunkenness of the said O. P., to be directed to such persons as to the court may seem proper.

[*Verification as in No.* 96]. J. P.

No. 100.

Petition by Overseers of the Poor for a Commission against an Habitual Drunkard.

See ante, p. 151.

[*Title, &c., as in No.* 96.]

The petition of R. F. and C. A. respectfully shows: That they are overseers of the poor of the town of ——, in the county of ——; That O. P., who resides in said town of ——, farmer, is an habitual drunkard, and has been such for six months, or more, last past. That the said O. P. is aged about thirty years; and has a family, to wit: a wife and two children, who are dependent upon him and his property for support. That the said O. P. is the owner of real estate situated in ——, aforesaid, consisting of a small farm of about 80 acres, with dwelling-house, &c., thereon; and also the owner of personal property, consisting of the usual stock, farming utensils, &c., necessary for the

carrying on of said farm. That the said real estate is estimated to be worth about two thousand dollars; but the same is incumbered by mortgage amounting to eight hundred dollars, and interest thereon for about one year. That the said personal property is believed to be worth about two hundred dollars.

And your petitioners further show that about one year ago the said O. P. began the use of intoxicating drinks; and shortly thereafter became quite intemperate; and for the six months last past has been an habitual drunkard, and wholly incapable of the transaction of business; and is still in the same condition.

And your petitioners further show that in consequence of such habitual drunkenness, the said O. P. is rapidly spending his property, and is liable to be defrauded and plundered by others; and that if he is allowed to have the control and management of his property much longer, he will, as your petitioners believe, soon squander and be stript of what now remains, and he and his family will become burthens to the town in which they reside; which facts will more fully appear by the affidavits hereto annexed.

Your petitioners, therefore, pray that a commission may issue to inquire into the fact of the habitual drunkenness of the said O. P., directed to such persons as to the court may seem proper.

R. F. } Overseers of
[*Verification.*] C. A. } the Poor.

No. 101.

Order for a Commission.

See ante, p. 155.

At, *&c.* [*as in No.* 6.]

[*Title, as in No.* 96.] On reading and filing the petition of H. R., of, *&c.*, dated the —— day of ——, 18—, and the affidavits of R. T., of, *&c.*, and G. A., of the same place, annexed to the said petition, and on motion of L. P. C., of counsel for the petitioner, it is ordered that a commission in the nature of writ de lunatico inquirendo be issued out of and under the seal of this court, in the usual form, directed to L. F., counselor at law, J. M. F., physician, and J. A., gentleman, all of the county of ——, to inquire by a jury of the said county, and of the neighborhood where the said A. T. R. resides, of the lunacy of the said A. T. R.; and that the sheriff of said county be instructed in said commission to summon such jury.

And it is further ordered, that the said commission be executed at,

or at some convenient place near to, the residence of the said A. T. R.; and that previous notice of the time and place of such execution be given to the said A. T. R., and to the person or persons having the care of him.

And it is further ordered, that upon the execution of the said commission, the person or persons having the care or custody of the said A. T. R., do produce him before the said commissioners and jury, to be inspected and examined by them, whenever required to do so by such commissioners.

No. 102.

Commission to Inquire of Lunacy, &c.

See ante, p. 155.

The People of the State of New York:

To L. F., J. M. F., and J. A., of the county of ——, greeting:

Know ye, that we have assigned to you, or any two of you, to inquire, by the oaths of good and lawful men of the county of ——, by whom the truth of the matter may be the better known, whether A. T. R., of the town of ——, in said county, is a lunatic, or enjoys lucid intervals [*or*, is an idiot], so that he is not sufficient for the government of himself, or the management of his lands and tenements, goods and chattels [*or*, is incapable of conducting his own affairs in consequence of habitual drunkenness]; and if so, from what time, after what manner, and how. And if the said A. T. R., being in that condition, has alienated any lands and tenements or not, and if so, what lands and tenements, to what person or persons, when, where, after what manner, and how; and what lands and tenements, goods and chattels, as yet remain to him; and of what value the lands and tenements by him alienated, as well as those by him retained, are, and how much the issues and profits thereof are worth by the year, and what is the value of his goods, chattels and personal estate; and who are the nearest heirs of the said A. T. R., who will be entitled to his estate in case of his death, and of what age. And therefore we command you, or any two of you, that at a certain day and place, or at certain days and places, which you for that purpose shall appoint, you diligently make inquisition in the premises; and that you cause reasonable notice of the time and place by you appointed for that purpose, to be given to the said A. T. R.; and that you send the inquisition which you shall thereupon make, under your

[L. S.]

seals, or the seals of any two of you, and the seals of those persons by whom it shall be made, distinctly and plainly, and without delay, to our Supreme Court [*or other court*], together with this writ.

And by the tenor of these presents, we command the sheriff of the county of ——, that at a certain day and place, or at certain days and places, which you shall make known to him, he cause to come before you, or any two of you, so many and such good and lawful men of his bailiwick as you shall direct, by whom the truth of the matters aforesaid may be the better inquired into.

Witness E. H. R., one the justices of said court, at ——, the —— day of ——, 18—.

L. P. C., Attorney. N. B. M., Clerk.

[*Endorsed.*] "By the Court," N. B. M., Clerk.

Return endorsed on Commission.

The execution of this commission appears in the schedule hereunto annexed. Dated, *&c.*

L. F.
J. M. F. } Commissioners.
J. A.

No. 103.

Precept to Sheriff to Summon a Jury.

See ante, p. 158.

To the Sheriff of the county of ——.

By virtue of a commission in the nature of a writ de lunatico inquirendo, issued out of and under the seal of the Supreme Court [*or other court*], bearing date the —— day of ——, 18—, to us whose names are subscribed hereto, directed, to inquire if A. T. R., of the town of ——, in the county of ——, be a lunatic or not.

These are therefore to require you to cause to come and appear before us, twenty-four honest and lawful men of the county aforesaid, and of the neighborhood where the said A. T. R. resides, on the —— day of —— next, by ten o'clock in the forenoon of the same day, at the Hotel kept by ——, in the village of —— [*or*, at the School House in School District No. ——, in the town of ——, aforesaid,] then and there upon their oaths to inquire of the lunacy of the said A. T. R.; and of all such matters and things as shall be given them in charge by virtue of said commission. Hereof fail not at your peril.

Given under our hands and seals this —— day of —— in the year of our Lord one thousand eight hundred and ——.

[*Signatures and seals of Commissioners.*]

Sheriff's Return, endorsed on Precept.

The execution of this precept appears in the panel hereto annexed.

H. R. C., Sheriff.

Schedule of Jurors to be annexed to return.

Names of the jurors summoned to inquire according to the tenor of the precept annexed. [*Names of Jurors.*]

No. 104.

Notice to Lunatic, &c., of Execution of Commission.

See ante, p. 157.

[*Title, as in No.* 96.]

To A. T. R. Sir: Take notice, that a commission to inquire as to your lunacy [*or*, idiocy, *or*, habitual drunkenness], issued out of and under the seal of the Supreme Court [*or other court*], and directed to the undersigned as commissioners, will be executed at the Hotel kept by ——, in the village of ——, [*or*, at the School House, in School District No. ——, in the town of ——, aforesaid], on the —— day of ——, instant, at 10 o'clock, A. M. Dated, *&c.*

[*Signatures of Commissioners.*]

No. 105.

Affidavit of Service of Notice.

See ante, pp. 157, 160.

[*Title, as in No.* 96.]

County of —— ss.; H. S. of ——, in said county, being duly sworn, says: That on the —— day of ——, 18—, he served on A. T. R., of, *&c.*, a copy of the annexed [*or*, above] notice by delivering the same to, and leaving the same with, the said A. T. R., at the town of ——, aforesaid. And he further says that he knew the person so named to be the person mentioned and described in the said notice.

Sworn, *&c.* H. S.

No. 106.

Notice to produce Lunatic, &c.

See ante, p. 160.

[*Title, as in No.* 96.]

To S. R., and to all others having in their custody or power, the above named A. T. R.

The undersigned by virtue of a commission issued out of the Supreme Court [*or other court*], to inquire as to the lunacy [*or*, idiocy, *or*, habitual drunkenness], of A. T. R., of, *&c.*, dated the —— day of

——, 18—, do hereby require you to produce before us the said A. T. R., at the execution of said commission, at the Hotel kept by ——, in the village of ——, [*or*, at the School House, in School District No. ——, in the town of ——, aforesaid], on the —— day of ——, 18—, at ten o'clock in the forenoon, there to be examined and inspected by us; and you are to give him notice accordingly.

Given under our hands and seals this —— day of ——, 18—.

[*Signed and sealed by Commissioners.*]

No. 107.

Subpœna for Witnesses.

See ante, p. 158.

By virtue of a commission issued out of and under the seal of the Supreme Court of the State of New York [*or other court*], dated the —— day of ——, 18—, and directed to the undersigned to inquire whether A. T. R., of the town of ——, in the county of ——, be a lunatic [*or*, idiot, *or*, an habitual drunkard], or not; we, the undersigned, do hereby require you, and each of you, personally, to be and appear before us at the execution of the said commission, at the Hotel kept by ——, in the village of ——, in said county [*or*, at the School House in School District No. ——, in said town], on the —— day of ——, inst., at ten o'clock in the forenoon, then and there to testify those things which you, or either of you, know, touching the lunacy [*or*, idiocy, *or*, habitual drunkenness], of the said A. T. R.; and all such other matters as shall be demanded of you by virtue of the said commission. Hereof fail not at your peril.

Given under our hands and seals the —— day of ——, 18—.

[*Signatures and Seals of Commissioners.*]

To S. R., B. R., and O. P. G., *&c.*

No. 108.

Oath to Jurors.

See ante, p. 160.

You do swear [*or*, affirm], well and truly to inquire touching the lunacy [*or*, idiocy, *or*, habitual drunkenness], of A. T. R., and of all such matters and things as shall be given you in charge by virtue of a commission issued out of and under the seal of the Supreme Court [*or other court*], and now here to be executed, and a true inquisition make according to evidence.

No. 109.

Oath of Witnesses.

See ante, p. 160.

You do swear [*or*, affirm], that the evidence you shall give touching the lunacy [*or*, idiocy, *or*, habitual drunkenness] of A. T. R., and as to who are his next of kin, and the nature, extent, and value of his real and personal estate, and all such other matters and things as shall be required of you, by virtue of a commission issued out of the Supreme Court [*or other court*], to inquire into the said lunacy [*or*, idiocy, *&c.*], and now here to be executed,—shall be the truth, the whole truth, and nothing but the truth.

No. 110.

Inquisition.

See ante, p. 161.

An inquisition, taken at the Hotel kept by ——, in the village of ——, in the county of —— [*or*, at the school house, in school district No. —, in the town of ——], on the —— day of ——, in the year one thousand eight hundred and ——, before L. F., J. A., and J. M. F., commissioners appointed by virtue of a commission in the nature of a writ de lunatico [*or*, idiota] inquirendo, issued out of and under the seal of the Supreme Court of the State of New York [*or other court*], dated on the —— day of ——, 18—, directed to the said commissioners, to inquire among other things of the lunacy of A. T. R., upon the oaths of J. S. M., *&c.* [*insert the names of the jurors*], good and lawful men of the said county, who being summoned, sworn and charged, upon their oaths, say, that the said A. T. R., at the time of taking this inquisition, is a lunatic and of unsound mind, and does not enjoy lucid intervals, so that he is incapable of the government of himself, or of the management of his lands, tenements, goods and chattels; and that he has been in the same state of lunacy for the space of two years last past. That the said A. T. R. has occasionally, for many years past, been afflicted with mental alienation, but what occasioned such mental alienation, or his present lunacy, the jurors aforesaid have no information, and know not.

And the jurors aforesaid, upon their oaths aforesaid, further say, that whether the said A. T. R., being in that state, has alienated any lands and tenements, or not, the jurors aforesaid know not [*or*, that the said A. T. R., being in the condition aforesaid, did, on or about the —— day of ——, 18—, at the village of ——, in said county, convey,

by warrantee deed, to one A. O. R., of, *&c.*, a certain lot owned by him in the village of ——, in said county, for the nominal consideration of —— dollars; and the money actually received by the said A. T. R., upon the sale of said lot, was only the sum of —— dollars, being not one fifth of the actual value of said lot].

And the jurors aforesaid, upon their oaths aforesaid, do further say that the following lands and tenements, situated in the town of ——, aforesaid, yet remain to him, the said A. T. R., to wit.: [*describe real estate*]. That the said lands and tenements, above described, are worth about —— dollars; and the issues and profits thereof, by the year, are worth about the sum of —— dollars.

And the jurors aforesaid, upon their oaths aforesaid, do further say, that the following goods and chattels yet remain to the said A. T. R., to wit: [*give general description of the personal property*]. That the value of the said goods and chattels, of the said A. T. R., is about the sum of —— dollars.

And the jurors aforesaid, upon their oaths aforesaid, do further say: That S. R. is the wife of the said A. T. R., and resides with him in ——, aforesaid. That N. R., H. R., R. R. and J. R., are the children of the said A. T. R., all of whom, except the said N. R., reside with said lunatic in ——, aforesaid. That the said N. R. resides in ——, in the State of ——, and is aged about 30 years. That the said H. R. is aged about 26 years; the said R. R. is aged about 24 years; and the said J. R. is aged about 21 years; and that the said children will be entitled to the estate of the said A. T. R. in equal proportions, in case of his death.

In witness whereof, as well the said commissioners, as the jurors aforesaid, have to this inquisition set their hands and seals, the day and year first above-written.

[*Signatures and Seals of Commissioners.*]
[*Signatures and Seals of Jurors.*]

No. 111.

Notice of Motion to Confirm Finding of Jury.

See ante, p. 164.

[*Title as in No.* 96.] Sir:—Take notice, that I shall apply to the next term of this court, to be held at the Court-house, in ——, in and for the county of ——, on the —— day of —— next [*or*, instant], at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order confirming the finding of the jury upon the commission heretofore issued in the above matter.

Also take notice, that I shall at the same time and place, apply for the appointment of a committee of the person and estate of said A. T. R.; or for such other or further order or relief as the court may think proper to grant; which motions will be founded on the said commission and the return thereto, and the inquisition taken under such commission; together with the petition, with a copy of which you are herewith served. Dated, *&c.* Yours, &c.,

L. P. C., Att'y for Petitioner.

To A. T. R., above named [*or*, To C. R. J., Att'y for said A. T. R.].

No. 112.

Petition for Appointment of Committee.

See ante, pp. 164, 165.

[*Title, &c., as in No.* 96.] The petition of H. R. of the town of ——, in the county of ——, respectfully shows: That the commission heretofore issued out of this court, in pursuance of an order made on the —— day of ——, 18—, directed to L. F., J. A. and J. M. F., to inquire of the lunacy [*or*, idiocy, *or*, habitual drunkenness], of A. T. R., of the town of ——, aforesaid, who is the father of your petitioner, has been duly executed and returned by the commissioners, and filed in the office of the clerk of this court. That from the inquisition annexed to the said commission, and returned therewith, it appears that the jury have found the said A. T. R. is a lunatic and of unsound mind [*or*, that the said A. T. R. is an idiot], so that he is incapable of the government of himself or the management of his lands, goods and chattels, as by reference to said inquisition will more fully appear.

Your petitioner therefore prays: That he may be appointed the committee of the person and estate of the said A. T. R., upon his giving security for the faithful performance of his trust as such committee, according to the statute, and in conformity with the rules and practice of the court [*or*, That a referee may be appointed to inquire and report who is a suitable and proper person to be appointed committee of the person and estate of the said A. T. R., and to approve of the bond and sureties offered by him]. And for such other or further order as the court may think proper to grant. H. R.

[*Jurat as in No.* 96.]

Consent annexed.

[*Title as in No.* 96.]

We, S. R., wife of A. T. R., above named, and R. R. and J. R. of, *&c.*, children of the said A. T. R., do hereby consent that H. R., of,

&c., be appointed committee of the person and estate of said A. T. R. And we do hereby request the said court to appoint said H. R. as such committee. Dated, *&c.*

[*Signatures.*]

[*Acknowledged or proved in usual form.* *See No.* 290.]

No. 113.

Order confirming finding of Jury, appointing Committee, &c.

See ante, p. 166.

At, *&c.* [*as in No.* 6.]

In Supreme Court, [*or other court.*]

In the matter
of
A. T. R., a lunatic.

On reading and filing the inquisition in the above matter, taken under a commission issued out of the Supreme Court [*or other court*], from which it appears that the jury have found the said A. T. R. is a lunatic, and of unsound mind [*or*, that the said A. T. R. is an idiot], so that he is incapable of the government of himself, or of the management of his lands, tenements, goods and chattels; and from which it also appears that the said A. T. R. is possessed of certain real and personal estate in the said inquisition described. Now on motion of L. P. C., attorney for H. R., and on hearing C. R. J., in behalf of said A. T. R., it is ordered that the finding of the jury upon the execution of the said commission, as set forth in said inquisition, be, and the same is, hereby confirmed.

And on reading and filing the petition of H. R., a son of said lunatic, dated the —— of ——, 18—, praying for the appointment of a committee of the person and estate of said A. T. R. [and the consent of S. R. and R. R. and J. R., the wife and two of the children of said A. T. R. that said H. R. be appointed such committee], it is, on like motion, ordered, (*) that the said H. R., be, and he is hereby appointed the committee of the person and estate of the said A. T. R., upon his filing with the clerk of this court a bond with two sufficient sureties, to be approved of by a justice [*or*, judge] of this court, in the penalty of —— dollars, and conditioned for the faithful performance of his trust as such committee, according to the statute and the rules and practice of the court, and to account whenever required, in conformity with such rules and practice.

[*If a reference is ordered to inquire as to the proper person to be appointed committee, &c., then from the* (*) *above proceed as follows:* That it be referred to O. F. T., Esq., residing at ——, in the county of —— to inquire and report who is a suitable and proper person to be appointed committee of the person and estate of the said A. T. R., and also to inquire and report as to the form and penalty of the bond to be given by such committee, and the sufficiency of the sureties offered by him. And it is further ordered, that the referee cause —— days' notice in writing to be served upon S. R. and R. R. and J. R., the wife and two of the children of the said A. T. R., residing in this State, of the time and place of executing the said reference; and that the said referee report hereon with all convenient speed.]

No. 114.

Referee's Report as to Committee.

See ante, p. 166.

[*Title as in No.* 113.]

To the Supreme Court of the State of New York [*or other court, as in No.* 96].

The undersigned, to whom it was referred by an order of this court, dated the —— day of ——, 18—, to inquire and report who is a suitable and proper person to be appointed committee of the person and estate of A. T. R., above named; and as to the form and penalty of the bond to be given by such committee, and the sufficiency of the sureties offered by him, do respectfully report:

That before entering upon the execution of said order, I caused —— days' notice, in writing, to be given to S. R. and R. R. and J. R., the wife and two of the children of the said lunatic, of the time and place of executing the same, to wit, on the —— day of ——, 18—, at 10 o'clock A. M., at my office in the village of ——. That at the time and place last aforesaid, I proceeded to execute the said order of reference, in the presence of L. P. C., Esq., attorney for the petitioner, and R. R. and J. R. above named. That after hearing the parties present, and making the necessary inquiries, I am of opinion that H. R., of the town of ——, aforesaid, a son of said lunatic, is a suitable and proper person to be appointed the committee of the person and estate of the said lunatic.

And I further certify and report that in the opinion of the undersigned, the said H. R. should, before entering upon the said trust, execute and file with the clerk of this court, his bond in the penalty

of $——, being double the value of the property of the said A. T. R., as found by the inquisition of the jury, conditioned for the faithful performance of his trust as such committee, according to the statute, and to account, whenever required, in conformity with the rules and practice of this court. That the said H. R. proposed as his sureties, W. T. F. and J. G. R., of *&c.*; and having taken from each of them an affidavit as to his sufficiency, and made inquiries relative thereto, I am satisfied that the sureties so proposed are sufficient; each being worth the sum of —— dollars, over and above all debts and responsibilities he owes or has incurred.

I further certify and report that I have indorsed upon the bond of the said H. R., signed by him and his sureties, aforesaid, in the penalty aforesaid, and conditioned as aforesaid, my approval of its form and manner of execution.

All which is respectfully submitted.

Dated, *&c.* O. F. T., Referee.

No. 115.

Order Confirming Referee's Report.

See ante, p. 166.

[*Title as in No.* 113.] At, *&c.* [*as in No.* 6].

On reading and filing the report of O. F. T., referee, dated the —— day of ——, 18—, made in pursuance of an order of this court, dated the —— day of ——, 18—; and on motion of L. P. C., attorney for the petitioner in this matter, no one appearing in opposition thereto, it is ordered, that the said report be, and the same is hereby, confirmed.

And it is further ordered, that H. R., of, *&c.*, be, and he is hereby, appointed the committee of the person and estate of the said A. T. R., upon his executing and filing with the clerk of this court, the bond mentioned in said report, to wit, the bond of the said H. R., in the penalty of —— dollars, signed by W. T. F. and J. G. R., of, *&c.*, as sureties, duly acknowledged, &c. according to the rules of the court, and conditioned for the faithful performance on the part of the said H. R. of the trust reposed in him as such committee, according to the statute, and that he will account, whenever required, in conformity with the rules and practice of this court.

And it is further ordered, that upon the filing of such bond, a commission may be issued to such committee, under the seal of this court.

No. 116.

Bond of Committee.

See ante, p. 166.

Know all men by these presents, That we, H. R., of the town of ——, in the county of ——, and W. T. F. and J. G. R., of the same place, are held and firmly bound unto N. B. M, clerk of the county of ——, and to his successor or successors in office, in the penal sum of —— dollars, to be paid to the said clerk, or to his successors aforesaid, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the —— day of ——, 18—. (*)

Whereas, by an order of the Supreme court [*or other court*] dated the —— day of ——, 18—, the said H. R. was appointed committee of the person and estate of A. T. R., of, *&c.*, who, by an inquisition taken under a commission issued out of said court, had previously thereto been found to be a lunatic, upon his giving the bond required by the said order.

Now, therefore, the condition of this obligation is such, that if the above-bounden H. R. shall faithfully perform the trust reposed in him as such committee, according to the statute, and shall render an account whenever required, in conformity with the rules and practice of the said court, and shall observe the orders and directions of the said court in relation to such trust, then this obligation to be void, otherwise to remain in full force and virtue.

H. R. [L. S.]
W. T. F. [L. S.]
Signed and sealed J. G. R. [L. S.]
in the presence of A. B.

[*Acknowledgment and Affidavit of Sureties, as in No.* 290.]

No. 117.

Petition for leave to Traverse, or for an Issue.

See ante, pp. 164, 167, 169.

In Supreme Court [*or other court*].

In the matter
of
E. H., an alleged lunatic.

To the Supreme Court of the State of New York [*or other court*]:
The petition of E. H., of, *&c.*, respectfully shows, That on the ——

day of —— last, at the city of New York, a notice was delivered to him, setting forth that a commission to inquire as to his lunacy, issued out of this court, and directed to J. B., H. B., and W. A., as commissioners, would be executed at the house kept by L. R., in the town of ——, aforesaid, on the —— day of ——, 18—, at 10 o'clock A. M. That your petitioner was then residing with his friends and relatives at the city of New York, which is distant more than two hundred miles from the place where the said commission was to be executed. That he proceeded at once to make preparation to leave that city for the purpose of attending the execution of said commission. That although he used every effort to arrive in said town of ——, where said commission was to be executed, prior to the said —— day of ——, 18—, yet he did not arrive there until about 9 o'clock A. M. of that day; too late to enable him to procure the attendance of several witnesses residing in the vicinity of that place, and who were material and necessary witnesses for your petitioner on the execution of said commission, as he verily believes. That the execution of said commission was proceeded with, by said commissioners, at the time and place aforesaid. That immediately prior thereto, your petitioner applied to them for a postponement thereof, to enable your petitioner to obtain the testimony of the said witnesses; and made affidavit before said commissioners to the materiality of said witnesses, and that he could not safely proceed to the trial of the question of your petitioner's lunacy without the benefit of their testimony; but the said commissioners refused to postpone said trial. That the said trial then proceeded as follows:

D. H. was called as a witness for the prosecution, and testified as follows: [*state the evidence, and proceed in same form as to other witnesses.*]

After the testimony was closed, the matter was submitted to the jury under the charge of one of the commissioners, twelve of whom found an inquisition that your petitioner was a lunatic, and incapable of the government of himself, or the management of his affairs, as by reference to said inquisition will more fully appear. That four of said jurors dissented from the inquisition so found, and were in favor of finding your petitioner of sound mind and memory, as your petitioner is informed and believes.

And your petitioner further shows, that upon the execution of said commission before the jury and commissioners, and in and about the house when and where the said trial was had, one J. C. F., upon whose

petition the said commission of lunacy was issued, pursued an insulting and irritating course towards your petitioner, telling your petitioner he lied, and using other unbecoming, provoking, and insulting expressions; and your petitioner says, that the anger exhibited by him under the influence of such conduct was contrasted with his usual manner, and urged, and, as your petitioner believes, taken, as evidence of his insanity.

And your petitioner further shows, That D. H., of, *&c*, who is a son of your petitioner, since the execution of the said commission, as your petitioner is informed and believes, has been appointed committee of the person and estate of your petitioner, and as such has taken possession and assumed the control of the whole real and personal estate of your petitioner. That the value of said property is about the sum of —— dollars.

And your petitioner further shows, that he is of sound mind, and entirely competent to manage his own affairs and business (as appears by the affidavits hereto annexed), and which your petitioner can fully establish by numerous individuals, physicians and others.

Your petitioner, therefore, prays that an order may be granted allowing your petitioner to traverse the said inquisition, or that an issue may be awarded to try the fact of the lunacy of your petitioner, and whether he is incapable of the government of himself, or the management of his affairs; and also that your petitioner be allowed out of his estate a reasonable sum to defray the costs and expenses of trying said issue, and the costs of this application, and for such other or further relief as the court may think proper to grant.

E. H.

M. F., Attorney for Petitioner.

[*Jurat, as in No. 96, to the end thereof, and then continue as follows.*]

And I further certify that I have examined the said E. H, for the purpose of ascertaining the state of his mind, and whether he is capable of understanding the nature or object of said petition; and that he is apparently of sound mind, and capable of understanding the same. [*If the alleged lunatic is blind, the officer should further certify as follows:* And I further certify that before the said petition was sworn to by said E. H., the same was carefully and correctly read over to him in my presence.]

H. F., Justice of the Peace.

No. 118.

Affidavits on Application for an Issue.

See ante, pp. 168, 169.

[*Title as in No.* 117.]

City and County of New York ss. W. G. of said city being duly sworn, says, that he is acquainted with E. H. above-named. That he saw said H., frequently during the two months next previous to the execution of the commission in the above matter, during the most of which time, said H. boarded with deponent. That deponent has never seen anything in the conduct or language of said H. that induced him to believe he was insane. And deponent believes said H. is not insane; but of sound mind and memory, and fully competent for the management of himself and his property.

Sworn, *&c.* W. G.

[*Title as in No.* 117.]

County of —— ss. T. W. of, *&c.*, being duly sworn, says, that he is a practicing physician and surgeon, and has been, for twenty-five years last past. That he is acquainted with E. H., of ——, in said county. That he has had a personal interview with the said E. H. this day; and that in the judgment of this deponent, the said H. is not a lunatic or an insane person. That deponent has frequently seen the said H., when it was said he was a lunatic; but this deponent could never discover that said H. was a lunatic or an insane person, and believes he is not, and has not been.

Sworn, &c. T. W.

[*Title as in No.* 117.]

County of —— ss. J. B. being duly sworn, says: He is a practicing physician and surgeon, and resides at ——, in said county. That deponent has been acquainted with E. H., of, *&c.*, for more than twenty years last past, and for the last two years has been his family physician. That deponent has seen much of said H. within the last year or more; and has conversed with him frequently during that time. That deponent has always believed said H. was a man of sound mind and understanding. That deponent has seen and conversed with said H. within the last week, and deponent still believes said H. is of sound mind and memory, and fully competent to manage himself and his property.

Sworn, *&c.* J. B.

No. 119.

Notice of Motion for Leave to Traverse, &c.

See ante, pp, 164, 167, 169.

[*Title as in No.* 117.]

Sir:—You will take notice that I intend to move this court, at the next special term thereof, to be held at the Court House in ——, in and for the county of ——, on the —— day of ——, instant, at —— o'clock A. M., or as soon thereafter as counsel can be heard, for an order that [the commission and return thereon, and the inquisition, and all subsequent or other proceedings in this matter, be set aside for irregularity, with costs to be paid by J. C. F., on whose petition said proceedings were had, and in case the said proceedings shall not be set aside that] E. H., above-named, have leave to traverse the inquisition in this matter, or that an issue be awarded to try the fact of the lunacy of said H., and whether he is capable of the government of himself, or the management of his affairs, and that said H. be allowed out of his estate, a reasonable sum to defray the costs and expenses of trying said issue and the costs of this application. And for such other or further relief as the court may think proper to grant; which motion will be founded upon the inquisition in this matter, and upon the petition and affidavits, with copies of which you are herewith served. Dated, *&c.*

Yours, &c.

To D. H., Committee. M. F., Attorney for Petitioner.

No. 120.

Order directing an Issue.

See ante, p. 169.

At, *&c.* [*as in No.* 6.]

[*Title as in No.* 117.] On reading and filing the petition of E. H., above named, dated the —— day of ——, 18—, praying for an order directing an issue to try the question whether the said E. H. is a lunatic, and incompetent for the government of himself or the management of his estate; and on reading and filing the affidavits of W. G. and others, in support of said petition; it is, on motion of M. F., attorney for said petitioner, after hearing J. C. B., in behalf of the committee of the said E. H., ordered, that an issue be made up and settled to try the question whether E. H., above named, be a lunatic, and mentally incapable of the government of himself, or the management of his affairs; and that the said issue be tried at the next circuit to be

held in and for the county of ——, [*or*, at the term of this court commencing on the —— day of —— next].

And it is further ordered that the attorney for said E. H., in the first instance prepare the issue, and submit it to the attorney of the said committee; and that if they cannot agree as to the form, &c., that application be made to the court; and that if the attorney for said E. H. shall omit to prepare such issue, and to serve the same on the attorney for the said committee, within twenty days after service of a copy of this order, then the order for an issue shall be deemed discharged.

And it is further ordered that the said committee pay to the attorney of said E. H., the sum of ——— dollars; and also pay to said E. H., or to his attorney, such further reasonable sums as shall be requisite to procure the attendance of witnesses upon the trial of said issue, and for the employment of proper counsel before the court and jury.

No. 121.

Petition to Supersede Commission.

See ante, p. 172.

[*Title as in No.* 113.]

The petition of E. H., of, *&c.*, respectfully shows.

That your petitioner has been adjudged a lunatic and incompetent to manage his own affairs and property, by virtue of an inquisition of lunacy heretofore ordered by this court. That the property, real and personal, of your petitioner has been placed in the care and custody of D. H., of, *&c.*, who was appointed the committee of the person and estate of your petitioner; and the said D. H. is still such committee.

And your petitioner further shows, that he is now of sound mind and understanding and entirely competent to manage his own affairs and business, as appears by the affidavits hereto annexed, and which your petitioner can fully establish by numerous individuals, physicians and others.

Your petitioner therefore prays, that he may be at liberty to attend in open court, or before a referee, for the purpose of being examined as to his sanity of mind, and his competency to manage himself and his property; and that the said commission and inquisition, and proceedings therein, may be superseded forthwith; and that a supersedeas may issue for that purpose, and that a referee may be appointed to take and state the account of said committee; or for such other or further order as may be proper. E. H.

[*Jurat, as in No.* 117.]

Affidavits Annexed.

[*Title as in No.* 113.]

County of —— ss. O. P. G., of ——, in said county, being duly sworn, says: That he is now, and has been for the last twenty-five years, a practicing physician and surgeon; that he is well acquainted with E. H., of, *&c.*; and has been for the last few weeks in a situation, to see him, and converse with him, almost daily; that deponent verily believes that the said H. is now perfectly sane and of sound mind, and competent in every respect to manage his own affairs and business. And deponent further says, that he believes the said H. has been of sound mind and competent to manage his own affairs, for several weeks last past. O. P. G.

Sworn, *&c.*

No. 122.

Notice of Motion to Supersede Commission.

See ante, p. 172.

[*Title as in No.* 113.]

Sir: Take notice that a petition and affidavits, with copies whereof you are herewith served, will be presented to the Supreme Court [*or other court*] at the next special term thereof, to be held at the Court House, in ——, on the —— day of ——, instant, at the opening of the court on that day, or as soon thereafter as counsel can be heard; and that upon reading and filing the same, a motion will be made that the prayer of said petition be granted; or for such other or further order as the court may think proper to grant. Dated, *&c.*

Yours, &c., B. F. A., Attorney for Petitioner.

To D. H., Committee, &c.

No. 123.

Order to Supersede Commission.

See ante, p. 172.

[*Title as in No.* 113.] At, *&c.* [*as in No.* 6.]

On reading and filing the petition E. H, above named, dated the —— day of ——, 18—, praying that the commission, inquisition, &c., in the above matter, may be superseded; and also, on reading and filing the affidavits of O. P. G., R. D. S. and R. T. F., in support of said petition, and upon examining the said E. H., in open court, as to his sanity of mind and competency of understanding,—it is, on motion of Mr. A., attorney for said E. H., no one appearing in opposition thereto, ordered, that the commission of lunacy issued against the

said E. H., and the inquisition taken thereon, be and the same is hereby superseded and determined. [*Or*, that the commission of lunacy issued against the said E. H. be and the same is hereby suspended until the further order of this court.]

No. 124.

Order of Reference on Motion to Supersede Commission.

See ante, p. 172.

At, *&c.* [*as in No.* 6.]

[*Title, as in No.* 113.] On reading and filing the petition of E. H., above named, dated the —— day of ——, 18—, praying for an order that the commission in this matter be superseded, and on reading and filing sundry affidavits in support of said petition, and notice of motion; and on motion of Mr. A, attorney for the petitioner, after hearing Mr. W. of counsel for the committee, it is ordered that it be referred to J. M., Esq., residing in the county of ——, to inquire and report whether the said E. H. is of sound mind and memory, and capable of the government of himself, and the management of his affairs; and whether the commission heretofore issued against the said E. H., as a lunatic, may, with propriety, be superseded, and the said E. H. be restored to his personal liberty and the management of his property; that the said referee cause notice to be given of the time and place for conducting his examination, to the said E. H., and to D. H., committee of the person and estate of the said E. H.; that the said referee be at liberty to examine witnesses under oath; and also personally to examine the said E. H., if he shall deem it advisable so to do; and that the said referee report his opinion, formed from the said testimony and personal interview, with all convenient speed.

No. 125.

Referee's Report thereon.

See ante, p. 172.

[*Title, as in No.* 113.] To the Supreme Court of the State of New York [*or other court*].

In pursuance of an order of the Supreme Court [*or other court*], made in the above-entitled matter, dated the —— day of ——, 18— by which it was referred to J. M., residing in the county of ——, to inquire and report whether, *&c.* [*set out the substance of the order*], I, the said referee, do report:

That I have been attended by the said E. H. and his attorney, and

by D. H., the committee of the person and estate of the said E. H., after due service upon them of the notice required to be given to them, as aforesaid, for that purpose ; and after taking proofs by the examination of witnesses produced before me, and also after a personal examination of the said E. H., I, the said referee, am satisfied that the said E. H. is of sound mind and memory, and capable of the control of himself and the management of his affairs.

And I do further report, that the commission heretofore issued against the said E. H., as a lunatic, may, with propriety, be superseded, and the said E. H. restored to his personal liberty and the management of his property [*or*, may, with propriety, be suspended until the further order of the court.]

All which is respectfully submitted.

Dated, *&c.* J. M., Referee.

No. 126.

Order Superseding Commission on Referee's Report.

See ante, p. 172.

At, *&c.* [*as in No.* 6.]

[*Title, as in No.* 113.] On reading and filing the report of J. M., Esq., referee, dated the —— day of ——, 18—, made in pursuance of an order of this court, bearing date the —— day of —— last, and on motion of B. F. A., of counsel for the petitioner, it is ordered that the said report, and all things therein contained, do stand ratified and confirmed.

And it is further ordered, adjudged, and determined, and this court, by virtue of the power and authority therein vested, does order, adjudge, and determine, that the commission of lunacy issued against the said E. H., dated the —— day of ——, 18—, and the subsequent proceedings thereon, be forthwith superseded and determined [*or*, suspended until the further order of this court].

No. 127.

Certificate of Officer to Affidavit or Petition of Lunatic, &c.

See ante, p. 174.

[*Jurat or verification substantially as in No.* 96, *and then proceed as follows :*] And I further certify that I have examined the said E. H., for the purpose of ascertaining the state of his mind, and whether he is capable of understanding the nature or object of said affidavit [*or*, petition], and that he is apparently of sound mind and capable of understanding the same. [*If the party is blind, the officer should further*

certify as follows: And I further certify, that before the said affidavit [*or*, petition] was sworn to by the said E. H., the same was carefully and correctly read over to him in my presence.]

H. F., Justice of the Peace.

No. 128.

Petition for Order to obtain payment of Claim out of Lunatic's Estate.

See ante, p. 175.

In Supreme Court [*or other court*].

In the matter of the application of R. M. F.

To the Supreme Court of the State of New York [*or other court*]:

The petition of R. M. F., of, *&c.*, respectfully shows: That E. H., of, *&c.*, is justly indebted to your petitioner in the sum of —— dollars, with interest thereon from the —— day of ——, 18—, for goods, wares and merchandise furnished to him at his request, during the years 1856 and 1857. That an account of the goods, &c., so furnished, as aforesaid, is hereto annexed, marked schedule "A." That the items mentioned in said account are in all respects correct; that the goods, wares and merchandise there charged were in fact delivered to the said E. H. at the times stated in said account, and that no part of said account has been paid or satisfied [except the sum of —— dollars, which is credited therein].

And your petitioner further shows, that the said E. H. is also indebted to your petitioner in the further sum of —— dollars, with interest thereon from the —— day of ——, 18—, for the services and disbursements of your petitioner, mentioned in the account hereto annexed, marked schedule "B." That the items in said account, last aforesaid, are in all respects correct; that such services and disbursements have in fact been rendered or made, and that no part of said account has been paid or satisfied [except the sum of —— dollars, stated therein].

And your petitioner further shows, that he is informed and believes that the said E. H. has been declared a lunatic by the Supreme Court [*or other court*], and that D. H., residing at ——, in said county, is now the committee of his person and estate; and that he has been such committee for several months last past.

Your petitioner further shows, that he has duly presented the said accounts [*or*, has caused the said accounts to be duly presented], to

the said committee, for payment; but the said committee declined [*or*, refused, *or*, has neglected], to pay the same, or any part thereof; and the sum of —— dollars, with interest as aforesaid, is now justly due thereon to your petitioner.

Your petitioner therefore prays, that an order may be entered directing the said committee to pay to your petitioner the amount of his accounts aforesaid [or the balance due thereon], to wit: the sum of —— dollars, with interest thereon from the —— day of ——, 18—; or that a reference may be ordered to pass upon the said accounts; or that your petitioner may have leave to bring an action against the said committee to establish and adjust the said accounts, and the amount due him upon the same; or for such other or further order as the court may think proper to make. R. M. F.

L. P. C., Atty. for Petitioner.

[*Jurat, as in No.* 96.]

Schedule "A," referred to in the annexed petition.

Schedule "B," referred to in the annexed petition.

No. 129.

Notice of Motion to Compel Payment of Claim.

See ante, p. 175.

[*Title as in last form.*]

Sir: Take notice, that I shall apply to the next special term of the Supreme Court [*or other court*], to be held at the Court House in ——, on the —— day of —— next, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order that the prayer of the petition hereto annexed, be granted with costs, to be paid out of the estate of E. H., a lunatic, or for such other or further order as the court may think proper to grant; which motion will be founded upon the said petition, with a copy of which you are herewith served. Dated, *&c.* Yours, &c.,

L. P. C., Atty. for Petitioner.

To D. H., Committee of E. H., a lunatic.

No. 130.

Order thereupon.

See ante, p. 175.

[*Title as in No.* 128.] At, *&c.* [*as in No.* 6.]

[*Title, also, as in No.* 113.]

On reading and filing the petition of R. M. F. of, *&c.*, dated the —— day of ——, 18—, praying for an order requiring D. H., committee of the person and estate of the abovenamed lunatic, to pay the

accounts and demands stated in said petition, &c. ; and after hearing L. P. C., Esq., attorney for the petitioner, and U. G. P., Esq., counsel for the said committee, it is ordered, (*) that the committee of the estate of E. H., above named, pay to the said petitioner, or to his attorney, within —— days from the service of a copy of this order upon him, the amount of the said petitioner's claims, mentioned in said petition, and which are here adjusted at the sum of —— dollars, and interest thereon from the —— day of ——, 18—. And it is further ordered, that the said committee pay to the attorney for the said petitioner ten dollars costs of this application. [*Or, from the asterisk*, (*) *proceed as follows :* that it be referred to L. F., Esq., residing in the county of ——, to pass upon and adjust the several accounts and demands of the said petitioner mentioned in the said petition, and to determine the amount justly due the said petitioner thereon ; and that the said referee make his report to the court with all convenient speed. *Or*, that R. M. F., above named, have leave to bring an action in the Supreme Court [*or other court*], against D. H., the committee of said lunatic, for the purpose of establishing and adjusting the claims and accounts mentioned in said petition, and the amount due thereon, if anything, to the said petitioner. And that the said petitioner, if he shall think proper so to do, may join the said E. H., as a party defendant in said action.]

No. 131.

Annual Inventory and Account Current, to be rendered by Committee.

See ante, p. 179; and see also, Ch. Court Rules, 1844, p. 169; and Rules of S. C. in Eq. 1847, p. 102.

[*Title as in No.* 113]. INVENTORY.

A just and true inventory of the real and personal estate and effects of the above-named lunatic [*or other person*], on the 31st December, 1832. (*a*)

1832. Dec. 31.

Balance of Cash on hand this day . . .	$16 74
Robert Gay's bond and mortgage on real estate, which is well secured, with interest at 7 per cent. from 31st December, 1832	350 00

(*a*) The original inventory should also contain a list of the debts existing against the lunatic, so far as the same can be ascertained by the committee, with the names of the creditors, and the nature of the indebtedness. See 2 *R. S.* 53, *sec.* 8, *ante, p.* 179.

[*Proceed in like manner in respect to other items.*]

D. H., Committee.

Account Current.

The estate of A. B., a lunatic.

To D. H., Committee.

1832.		Dr.
May 2.	To cash paid M. Low's bill for board and lodging, &c.	$27 33
June 4.	Dr Jones' bill for medical attendance . .	9 17

[*Proceed in like manner with the other items.*]

Contra.

1832.		Cr.
Jan. 1.	Balance due as by last annual account . .	$27 32
Feb. 2.	Cash received, one quarter's rent on dwelling-house in Utica	45 00

[*Continue with the items as before, and foot up the columns, so as to show the balance due to the estate, if any.*]

Dated, *&c.* D. H., Committee.

County of ——, ss.: D. H., the committee of the above-named lunatic, being duly sworn, says, that the above is a just and true inventory of the whole real and personal estate and effects of the above-named lunatic, so far as the same have come to his knowledge, and a just and true account of all the receipts and disbursements on account of the said estate [since this deponent rendered his last account current in this matter to this court]. [*In the first account the words between the brackets are to be omitted.*]

Sworn, *&c.* D. H.

No. 132.

Petition for a Sale of Real Estate, to pay Debts. (*a*)

See ante, p. 187.

[*Title as in No.* 113.]

To the Supreme Court of the State of New York [*or other court:*]

The petition of H. R., of, *&c.*, respectfully shows: That he is the committee of the person and estate of A. T. R., above-named; and was appointed such committee by an order of this court, dated the —— day of ——, 18—. That after his appointment as such commit-

(*a*) The proceedings for a sale, &c., for the maintenance of the lunatic, or his family, or for the education of his children, are similar to those on a sale for the payment of debts; and the forms Nos. 132 to 140, may be used, in such case, with the necessary alterations.

tee, he duly made out and verified an inventory of the real and personal estate of the said A. T. R., and in such inventory stated the value thereof, and the amount of the rents and profits of the said real estate, and the debts owing by the said lunatic, and the credits and effects belonging to the said estate, a copy of which inventory is hereto annexed, marked Schedule "A."

And your petitioner further shows, that the said A. T. R. is the owner of the following real estate situated in the town of ——, in said county, and bounded and described as follows: [*insert description*]. That the said real estate is worth about the sum of —— dollars, and the issues and profits thereof by the year, are worth about the sum of —— dollars; and the actual amount realized therefor by your petitioner since his appointment as such committee, is the sum of —— dollars. That the value of the personal estate of said A. T. R., at the time of your petitioner's appointment as such committee, was the sum of —— dollars: but your petitioner has been obliged to sell and dispose of a considerable part thereof, to wit, the articles mentioned in Schedule "B.," hereto annexed, for the purpose of paying debts owing by the said lunatic, and the necessary expenses and disbursements attending said trust; and that the debts so paid, and the items of the expenses and disbursements aforesaid, are stated in the schedule hereto annexed, marked "C." That all the personal property in your petitioner's possession now belonging to the said lunatic is set forth in the schedule hereto annexed, marked "D."

And your petitioner further shows, that the debts yet existing against the said estate, are set forth, with the amounts thereof, in the schedule hereto annexed, marked schedule "E," [*or*, that the following is an account of the debts now existing against the said estate, viz.: *set forth list of debts, with their amounts*]. That the aggregate amount of such debts is —— dollars, or thereabouts; for the payment of which, in addition to the expenses of supporting said lunatic, the income of said real and personal estate is wholly insufficient; and that the whole of said personal estate, if sold for that purpose, would not be sufficient to discharge the said debts.

Your petitioner therefore prays, that he may be authorized, by an order of this court, to mortgage or sell so much of the real estate of said lunatic as may be necessary for the payment of his debts.

[*Jurat, as in No.* 96]. H. R.

[*Annex Schedules mentioned in the Petition.*]

No. 133.

Order of Reference thereon.

See ante, p. 188.

[*Title, as in No.* 113]. At, *&c.* [*as in No.* 6].

On reading and filing the petition of H. R., committee of the person and estate of A. T. R., the above named lunatic, dated the —— day of ——, 18—, praying for authority to mortgage or sell so much of the real estate of the said lunatic, as may be necessary for the payment of his debts; and on motion of L. P. C., of counsel for the petitioner, ordered, that it be referred to L. F., Esq., residing in the county of ——, to inquire into and report upon the matters in the said petition contained, and to inquire into the truth of the representations therein made, and to hear the parties interested in the said estate, and to report to this court with all convenient speed whether the personal estate of the said lunatic is insufficient for the payment of his debts; and whether a mortgage or sale of the real estate of the said lunatic, or any part thereof, is necessary, for that purpose; and if so, which would be most advantageous to the said lunatic; and if a sale, his reasons therefor; and whether a sale or mortgage of the whole, or only a part, of said premises is necessary; and if only a part thereof is necessary to be mortgaged or sold, that he specify what particular part thereof can be disposed of, with the least injury to the interests of the said lunatic.

No. 134.

Notice by Referee of Proceedings before him.

See ante, p. 188.

[*Title as in No.* 113.]

To R. R., and all others interested.

Whereas, by an order of this court, dated the —— day of ——, 18—, it was referred to the undersigned to inquire into and report upon the matters contained in the petition of H. R., committee, &c., praying for leave to sell or mortgage the real estate of A. T. R., above named, for the payment of his debts.

You will, therefore take notice that I shall proceed to an examination into the said matters on the —— day of ——, 18—, at —— o'clock, —. M., of that day, at my office in ———. Dated, *&c.*

L. F., Referee.

No. 135.

Referee's Report as to the Necessity of a Sale, &c.

See ante, p. 189.

[*Title as in No.* 113.] To the Supreme Court of the State of New York [*or other court*].

The undersigned, appointed referee by an order of this court, dated the —— day of ——, 18—, and therein directed to inquire and report as to the matters contained in the petition of H. R., committee of the estate of the above named lunatic, do report:

That having caused —— days' notice in writing, to be given to R. R. and J. R., of, *&c.*, who are the children and next of kin of said lunatic, residing in this State, and having been attended by the attorney for the said committee, the said R. R. and J. R., failing to appear, I proceeded to make the inquiries directed by the said order.

That from the evidence produced before me, I am satisfied that the facts stated in the said petition of H. R., committee aforesaid, are true. That I have ascertained that the personal estate now owned by the said lunatic is worth the sum of —— dollars. That a considerable part of the personal estate originally belonging to said lunatic, has been sold and applied to his support and maintenance, and the payment of debts owing by him, and the necessary and proper expenses and disbursements attending said trust. That the personal property now owned by the said lunatic is insufficient for the payment of his debts; and that it is not advisable the same should be sold, for the reason that the most of it is necessary household furniture, and all of it is needed in the house and premises of said lunatic for the use of said lunatic and his family.

And I further report, that the debts owing by the said lunatic, amount to the sum of —— dollars; and are due to the following persons: [*state names of creditors, and the amount and nature of the indebtedness*].

That a sale of a portion [*or*, the whole], of the real estate of said lunatic is necessary for the payment of those debts; and that such sale would be preferable to a mortgage, for the reason [*state reasons*]. That the part of said real estate which can be disposed of with the least injury to the interests of said lunatic, is that piece or parcel of real estate situate, *&c.* [*describe it*], which is estimated to be worth about —— dollars.

All which is respectfully submitted.

Dated, *&c.* L. F, Referee.

No. 136.

Order to confirm Referee's Report.

See ante, p. 189.

[*Title as in No.* 113.] At, *&c.* [*as in No.* 6].

On reading and filing the report of L. F., Esq., referee, residing in

the county of ——, dated the —— day of ——, 18—, and on motion of L. P. C., attorney for H. R., committee of the above-named lunatic, it is ordered that the said report be, and the same is hereby, confirmed.

And it appearing to the court from the said report, and an examination of the matter, that the personal estate of the said lunatic is insufficient for the payment of his debts, and that the same has been applied to that purpose as far as the circumstances of the case rendered proper; that the value of the personal estate now owned by him amounts to —— dollars, and that the debts now owing by the said lunatic amount to —— dollars, and that a sale of a portion [*or*, the whole] of the real estate of said lunatic is necessary for the payment of said debts; it is further ordered, that the said H. R., committee, aforesaid, be, and he is hereby, authorized and directed to sell, at public or private sale, subject to the approbation of this court, the piece or parcel of real estate owned by said lunatic, and described in said report, for the purpose of paying and discharging the debts of the said lunatic, which said real estate is described as aforesaid, as follows: [*insert description*].

And it is further ordered, that before any conveyance in pursuance of such sale shall be executed, the terms of such sale shall be reported by the said committee, on oath, to the court, and confirmed by the said court.

No. 137.

Report of Sale by Committee.

See ante, p. 189.

[*Title and address as in No.* 135.]

In pursuance of an order of this court in the above matter, dated the —— day of ——, 18—, authorizing and directing me to sell, at public or private sale, subject to the approbation of this court, the real estate mentioned in said order, for the purpose of paying and discharging the debts of the said lunatic, and directing me to report the terms of such sale to this court, upon oath, before any conveyance of said premises should be executed, I, the subscriber, the committee of the said lunatic, do report:

That I have sold, subject to the approbation of this court, to D. C., of, *&c.*, the piece or parcel of real estate specified in said order, at and for the price or sum of —— dollars, to be paid on the delivery of the deed therefor; which sum is the highest price that could be obtained for the said real estate. [*Or*, That pursuant to previous public notice given by me, for that purpose, for the space of —— weeks, I did, on

the —— day of ——, 18—, at, *&c.*, sell at public auction, to D. C., of, *&c.*, the piece or parcel of real estate mentioned in said order, for the price or sum of —— dollars, the said D. C. being the highest bidder, and that being the highest sum bid therefor; and that by the terms of said sale the purchase money is to be paid on the delivery of the deed, after the court shall have confirmed the said sale.]

All which is respectfully submitted.

Dated, *&c.* H. R., Committee.

County of ——, ss.: H. R., the committee of the estate of E. H., above named, being duly sworn, says, that he has read the above report, subscribed by him, and knows the contents thereof, and that the matters therein stated are true.

Sworn, *&c.* H. R.

No. 138.

Order Confirming Sale and Directing Conveyance.

See ante, p. 198.

At, *&c.* [*as in No.* 6.]

[*Title, as in No.* 113.] On reading and filing the report of H. R., the committee of the estate of the above-named lunatic, made upon oath, dated the —— day of ——, 18—, stating, *&c.* [*set out the report*], it is, on motion of L. P. C., attorney for the said committee, ordered that the said report, and the sale therein mentioned, be and the same are hereby ratified and confirmed.

And it is further ordered that the said committee execute and deliver to D. C., the purchaser in the said report mentioned, a good and sufficient conveyance of the piece or parcel of land purchased by him, upon receiving the purchase money agreed to be paid therefor. And that the said committee apply the net proceeds of the said sale, after deducting the costs of these proceedings to be taxed, and the other necessary expenses of effecting said sale, to the payment and discharge of the debts of the said lunatic, specified in the report of L. F., Esq., bearing date the —— day of ——, 18—.(*a*)

[*If additional security is required to be given, add:*] And it is further ordered that the said committee, before receiving the said proceeds from the purchaser, shall give additional security, by a bond, with

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(*a*) If a sale is ordered in cases where the personal estate is insufficient for the maintenance of the lunatic, &c., the order confirming the sale should direct the manner in which the proceeds of the sale shall be secured, and the income or produce thereof appropriated. 2 *R. S.* 54, *sec.* 17.

two sureties, to be approved of by a justice [*or*, a judge] of this court, and filed with the clerk, conditioned for the faithful application of and accounting for, the proceeds of said sale.

No. 139.

Bond of Committee on Sale of Real Estate.

See ante, p. 190.

[*The same as in No.* 116, *to the* (*), *and then as follows :*]

Whereas, by an order of the Supreme Court [*or other court*], dated the —— day of ——, 18—, H. R., above named, who is the committee of the person and estate of A. T. R., a lunatic, was authorized and directed to convey the real estate of said lunatic, situated in the town of ——, aforesaid, mentioned in said order, to D. C., on his receiving the purchase-money agreed to be paid therefor.

Now, therefore, the condition of this obligation is such, that if the above-bounden H. R. shall faithfully apply the proceeds of such sale to the payment of the debts against said lunatic, and shall also faithfully account for the said proceeds, then the above obligation to be void, otherwise to remain in full force and virtue.

[*Signed, acknowledged, &c., as in No.* 116.]

No. 140.

Deed of Committee.

See ante, p. 190.

This indenture made the —— day of ——, 18—, between H. R., of the town of ——, in the county of ——, and State of New York, committee of the person and estate of A. T. R., a lunatic, of the first part, and D. C. of the same place, of the second part.

Whereas, by an order of the Supreme Court [*or other court*], made on the —— day of ——, 18—, reciting that it appeared to the said court that the personal estate of the said A. T. R. was insufficient for the payment of his debts, and that a sale of a portion [*or*, the whole] of the real estate of the said lunatic was necessary for the payment thereof, the said party of the first part, as such committee, was, among other things, authorized and directed to sell, at public or private sale, subject to the approbation of the court, the piece or parcel of real estate owned by said lunatic, and specified in said order, for the purpose of paying and discharging the debts of the said lunatic, and to report the terms of the sale made by him, to the court, on oath, before any conveyance of the said premises should be executed. And whereas, the said party of the first part, as such committee, having in pursuance of the

said order, on the —— day of ——, made his report to the court, stating, *&c.* [*state the substance of the report of sale*]. And whereas by another order of the said court, dated —— day of ——, 18—, it was ordered that, *&c.* [*state order confirming sale, &c.*]

Now, therefore, this indenture witnesseth that the said party of the first part, committee as aforesaid, by virtue of the power and authority conferred upon him by the several orders above-mentioned, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of —— dollars, to him in hand paid at or before the ensealing and delivery of these presents, by the party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, and conveyed, and by these presents does grant, bargain, sell, remise, release, and convey, unto the said party of the second part, his heirs and assigns forever, all the right, title, and interest of the said lunatic of, in, and to, all that certain piece or parcel of land bounded and described as follows: [*insert description*]. To have and to hold the said premises, and every part and parcel thereof, with the appurtenances, to the said D. C., his heirs and assigns, to his and their only proper use, benefit and behoof forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above-written.

Sealed and delivered in presence of L. F. H. R. [*Seal.*]

CHAPTER VII.

FORMS UNDER LIEN LAWS.

SECTION I.

FORMS UNDER LAW RELATING TO THE CITY AND COUNTY OF NEW YORK.

No. 141.

Notice of Lien.

See ante, pp. 209 to 212.

To R. B. C., Esq.. Clerk of the city and county of New York:

SIR: Please to take notice, that I, A. B., of the city of New York, have a claim against C. D., of the same place, amounting to the sum of —— dollars. That the said claim is for materials furnished to the said C. D. [*or*, work and labor performed for the said C. D.], to wit:

[*describe the claim for the materials, or the work performed*]. That six months have not elapsed since the said materials were furnished [*or*, the said work was performed]. That the said materials were furnished to and used by the said C. D., who is the contractor of E. F., hereinafter named, in pursuance of an agreement with said contractor, and in conformity with the terms of a contract between the said C. D. and E F., in the erection [*or*, alteration, *or*, repairing] of the building and appurtenances hereinafter described. That the said E. F. is, as the said A. B. is informed and believes, the owner of said building; that said building is situated in the —— ward of the city of New York, on, *&c.* [*describe the situation of the building by its street and number. If the number is not known, state the fact, and describe it on the street as definitely as possible.*]

Also take notice, that I have and claim a lien on the building and appurtenances above-mentioned, and upon the lot of land upon which the said building and appurtenances stand, pursuant to the provisions of an Act of the Legislature of the State of New York, entitled "An Act for the better security of Mechanics and others erecting buildings and furnishing materials therefor, in the City and County of New York," passed July 11, 1851; and of the act amending the same.

Dated this —— day of ——, 18—.

H. B., Att'y for claimant. A. B., Claimant.

City and County of New York, ss. A. B., being duly sworn, says: He is the claimant above named; that the foregoing notice of claim and statement therein, is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true. A. B.

Sworn to, *&c.*

No. 142.

Notice to Enforce Lien.

See ante, p. 217.

Court of Common Pleas for the city and county of New York, [*or other court*].

A. B., Claimant,
agst.
E. F., Owner.

To E. F., above named, the owner of the building situated in the first ward of the city of New York, on, *&c.*, [*describe the situation of the building as in the notice of lien.*]

You will please to take notice, That the subscriber having on the —— day of ——, 18—, filed with the clerk of the city and county of New York, the notice required by law to effect a lien on the building and premises above mentioned, for the sum of —— dollars, against C. D., contractor, as the person against whom the claim is made, and against you the said E. F., as owner; and which claim is for materials furnished [*or*, work performed] for the said C. D., prior to the filing of said notice, in erecting [*or*, altering, *or*, repairing] the building above mentioned, owned by you, in pursuance of an agreement with the said C. D., and in conformity with the terms of a contract between said contractor and you, to wit: [*describe the claim*]. And the said sum being due and payable you are hereby required to appear in the above named court of Common Pleas, at a special term thereof, to be held at the City Hall, in said city, either in person or by attorney, on the —— day of —— next, at —— o'clock in the —— noon of that day, and submit to an accounting and settlement in the said court of the amount due or claimed to be due, as aforesaid. Dated, this —— day of ——, 18—.

A. B., Claimant.

H. B., Attorney for Claimant,
No. —— Wall street, New York.

No. 143.

Claimant's Bill of Particulars.

See ante, p. 219.

[*Title as in No.* 142.]

A bill of particulars of the amount claimed to be due (and the items of the claim) from C. D., contractor, to A. B., claimant, for and on account of materials furnished, and used in the erection [*or*, altering, *or*, repairing] of a certain building owned by E. F., defendant in the annexed notice [*or*, in the notice heretofore served on him], and which building is situated in the first ward of the city and county of New York, on, *&c.* [*Describe the situation of the building.*]

C. D.

To A. B., Dr.

1858, August 1. To, *&c.*, [*set out all the items.*]

[*Endorsed:*]

To E. F., Defendant.

Take notice that the within is a copy of the claimant's bill of particulars in the within proceedings. Dated, *&c.*

Yours, &c. H. B., Attorney for Claimant.

No. 144.

Owner's Bill of Particulars of Set-Off.

See ante, p. 221.

[*Title as in No.* 142.]

A Bill of Particulars of the set-off claimed by E. F., the owner, above named, against the claim or lien of the said A. B., filed in the clerk's office of the city and county of New York, on the —— day of ——, 18—, viz.:

Moneys loaned by the said E. F. to the said A. B. at the times and to the amounts following:

1858.

June 1. To cash lent this day, - - $200 00

" 6. To, &c. [*Set out all the items :*]

Moneys advanced to C. D., the contractor mentioned in the said claimant's notice to foreclose said lien, at the times and to the amounts following:

1858.

Aug. 1. To, &c. [*Set out the items and their amounts.*]

[*Endorsed :*]

To A. B. within named. Take notice that the within is a copy of the owner's bill of particulars in the within mentioned proceedings. Dated, *&c.*

Yours, &c., W. R., Attorney for Owner.

No. 145.

Order for an Issue on Appearance of Parties.

See ante, p. 222.

At a special term of the Court of Common Pleas, for the city and county of New York, held at the City Hall, in that city, on the —— day of ——, 18—.

Present, Hon. D. B. I., First Judge.

A. B., Claimant, ag'st E. F., Owner. } On filing the notice of the plaintiff to the defendant to appear and submit to an accounting of the amount due under a certain lien filed the —— day of ——, 18—, against the defendant, as owner, and C. D. as contractor, in which there is claimed to be due the sum of —— dollars; and on filing the plaintiff's bill of particulars, and the bill of particulars of the offset claimed by the

defendant, and on both of said parties appearing for the purpose of joining issue, after hearing E. H., for the plaintiff, and W. R., for the defendant:

It is ordered that the issues herein, between the said parties, be joined by the plaintiff filing a complaint as in an ordinary action, and that he serve a copy thereof upon W. B., the defendant's attorney, within ten days after the date hereof, and that the defendant, in like manner, file his answer, and serve a copy thereof upon E. H, the plaintiff's attorney, within twenty days after the service of the said complaint.

No. 146.

Complaint against Owner and Contractor for Labor.

See ante, p. 223; and see Abb. Pl. 364, and notes.

[*Title.*] The complaint of the plaintiff A. B., filed pursuant to an order of this court, made on the —— day of ——, 18—, shows: That on the —— day of ——, 18—, the defendant C. D. entered into a contract with the defendant E. F., for the erection of a building and appurtenances upon the premises hereinafter described; by the terms of which contract it was agreed that, *&c.* [*State the terms of contract.*]

And the said plaintiff further shows: That the said contract has been performed by the said defendant, C. D.; and the defendant E. F. is justly indebted to the said C. D., upon the same, in the sum of —— dollars.

That between the —— day of ——, 18—, and the —— day of ——, 18—, the said plaintiff, in pursuance of an agreement heretofore entered into by him with the defendant C. D., and in conformity to the terms of the contract above mentioned, performed labor, as a carpenter, to the value of —— dollars, the nature, amount and value of which labor, are set forth in the bill of particulars filed herein. That by the terms of the agreement between the plaintiff and the defendant, C. D., the said sum of —— dollars became due on the —— day of ——, 18—, but the said defendant has not paid the same, or any part thereof, but is now justly indebted therefor to the plaintiff. That the said labor was performed in erecting [*or*, altering, *or*, repairing], a building and appurtenances, situated in the —— ward of the city and county of New York, on, *&c.* [*describe the situation of the premises*]. That the said building and premises were at the time the said labor was performed, and until the filing the notice of lien hereinafter mentioned, the property of the defendant, E. F.

And the said plaintiff further shows: That on the —— day of

——, 18—, he duly filed with the clerk of the city and county of New York, a notice of lien claimed upon said premises for the indebtedness aforesaid, which notice was duly verified, and specified the amount of the claim, as above stated, and also specified the defendant, C. D., as the person against whom the claim was made, and the deendant E. F., as the owner of said building, and which was therein described by the street and number, as aforesaid.

Wherefore the plaintiff demands judgment directing a sale of the interest of the defendant, E. F., in the building, appurtenances, and premises above described to the extent of the right of the said defendant at the time the notice of lien was filed, as aforesaid; and directing, also, that the proceeds of such sale be applied to the payment of the costs of these proceedings, and to the payment of the plaintiff's claim, as aforesaid; and that the residue of such proceeds, if any, be paid to the clerk of the city and county of New York, to abide the further order of the court; and the said plaintiff also demands judgment against the defendant, C. D., for the sum of —— dollars, aforesaid, with interest from the —— day of ——, 18—, together with the costs of these proceedings.

H. B., Attorney for Plaintiff.

No. 147.

Complaint by Contractor for Building Materials.

See ante, p. 223: and see Abb. Pl. 362, and notes.

[*Title.*]

The complaint of the plaintiff, C. D., filed pursuant to an order of this court, dated the —— day of ——, 18—, shows: That on the —— day of ——, 18—, at, *&c.*, the plaintiff, by virtue of a contract with the defendant, E. F., sold and delivered to the defendant certain building materials, consisting of —— of the value of —— dollars; the quantity and value of which is set forth in the bill of particulars filed herein. That by the terms of said contract and sale, the said sum of —— dollars became due to the plaintiff on the —— day of ——, 18—, but the defendant has not paid the same, and is now justly indebted therefor to the plaintiff. That the said materials were used in erecting a building and appurtenances situated in the —— ward of the city and county of New York, on, *&c.* [*describe the situation of the premises*], and which building and premises were, at the time of making the said contract, and until the filing of the notice of lien hereinafter mentioned, the property of the defendant.

And the said plaintiff further shows: That on the —— day of

——, 18—, the said plaintiff duly filed with the clerk of the city and county of New York, a notice of lien claimed upon said premises for the indebtedness aforesaid; which notice was duly verified, and specified the amount of the claim, as above-stated, and also specified the defendant as the person against whom the claim was made, and as the owner of said building, and which was therein described by the street and number, as aforesaid.

Wherefore, the plaintiff demands judgment directing a sale of the interest of the defendant in the building, appurtenances, and premises, aforesaid, to the extent of the right of the defendant at the time the notice of lien was filed, as aforesaid; and directing, also, that the proceeds of such sale be applied to the payment of the costs of these proceedings, and the plaintiff's claim, as aforesaid, and that the residue of the proceeds, if any, be paid to the clerk of the city and county of New York, to abide the further order of the court; and that, if the proceeds of such sale shall not be sufficient to discharge the said claim and costs, that the sheriff certify the amount of the deficiency in his report of sale, and that the claimant have execution therefor.

E. C., Attorney for Plaintiff.

No. 148.

Judgment on Failure of Owner to Appear.

See ante, p. 219.

[*Title.*] At, *&c.* [*as in No.* 145].

The above-named A. B., having acquired a lien against the defendant, E. F., as owner, on the —— day of ——, 18—, for the sum of —— dollars, in pursuance of the statute, upon the building and premises hereinafter described; and the said defendant having failed to appear at a special term of this court held on the —— day of ——, 18—, as required by the notice to enforce such lien, duly served on the defendant, on the —— day of ——, 18—. And the court having made an order on the said —— day of ——, 18—, that a writ of inquiry issue to the sheriff of the city and county of New York [*or*, that it be referred to M. F., of the city and county of New York], to assess the amount of the plaintiff's claim and damages therein; and the said sheriff, having on the —— day of ——, 18—, by the oaths of twelve good and lawful men, duly assessed the amount thereof, and having found the same to be the sum of —— dollars, as appears by the inquisition duly returned [*or*, and the said referee having, on the —— day of ——, 18—, made his report in writing, wherein it appears that

he has assessed the amount thereof, and found the same to be the sum of —— dollars, as will more fully appear by the said report on file with the clerk of this court].

Now, on motion of H. B, attorney for the said plaintiff, it is ordered, adjudged, and decreed that judgment be recovered by the plaintiff herein for the sum of —— dollars damages, and —— dollars costs, amounting in all to —— dollars.

And it is further ordered, adjudged and decreed, that the right of the said defendant, E. F., in the building and premises upon which said lien exists, to wit: All that certain piece or lot of land, *&c.* [*describe the premises*], to the extent of the right of the defendant, at the time the notice of lien was filed, as aforesaid, be sold at public auction, in the manner prescribed by law, and that the said sheriff be and he hereby is directed to apply the proceeds of such sale to the payment of the costs of these proceedings, above mentioned, and to the payment of the amount of the plaintiff's claim, as assessed as aforesaid; and that the residue of said proceeds, if any, be paid to the clerk of the city and county of New York, to abide the further order of this court.

No. 149.

Notice Requiring Claimant to Commence Proceedings.

See ante, p. 242.

To A. B. Sir: You will take notice that you are hereby required to commence an action for the enforcement of a certain lien filed by you, in the office of the clerk of the city and county of New York, on the —— day of ——, 18—, against E. F., as owner, and one C. D., as the person against whom the claim is made; the amount of said claim being ——dollars, and the premises affected by said lien being all that certain building and lot of land, *&c.* [*describe the premises*]; which said action you are hereby required to commence on or before one o'clock, P. M., of the —— day of ——, 18—. Dated, *&c.*

E. F., Owner.

No. 150.

Affidavit of Service of Notice in Last Form.

See ante, p. 243.

City and County of New York, ss.: H. S., of said city, being duly sworn, deposes and says: That on the —— day of ——, 18—, he personally served a copy of the above notice upon A. B., the claimant mentioned therein, by delivering the same to, and leaving the same

with, the said A. B., at his residence, No. —, Broadway, in said city. And deponent further says, that he knew the person so served, to be the person mentioned and described in said notice, as claimant therein.

Sworn, *&c.* H. S.

No. 151.

Satisfaction of Lien.

See ante, p. 244.

I do hereby certify that a certain lien for labor performed [*or*, materials furnished], filed in the office of the clerk of the city and county of New York, on the —— day of —— one thousand eight hundred and ——, at — o'clock in the ——noon, in favor of A. B., claimant, and against the building and lot situate in the —— ward of said city, on, *&c.* [*describe their situation*], owned by E. F., upon a claim against one C. D., contractor, is paid, satisfied and discharged.

A. B.

[*Add acknowledgment in the usual form. See No.* 290.]

SECTION II.

FORMS UNDER THE GENERAL LAW.

No. 152.

Contractor's Notice of Lien.

See ante, p. 251.

To J. M. C., Town Clerk of the town of ——, in the county of ——.

Take notice, that I., A. B., a resident of the village of ——, in said county, have a claim against E. F., of said village, amounting to the sum of —— dollars, for three months' labor performed for the said E. F., as a carpenter and joiner [*or*, for large quantities of lumber furnished to and used by the said E. F.], in pursuance of an agreement with him. That the said labor was performed [*or*, the said materials were furnished and used] in erecting the building, No. ——, and appurtenances, situated on Main street, in said village; and thirty days have not elapsed since the performance and completion of such labor [*or*, since the said materials were furnished]. That the said E. F. is the owner (*) of the said building and appurtenances, and the lot and premises upon which the same stand, which said lot and premises are situated in the town of ——, aforesaid, and are known and described as follows: [*describe premises*].

Also take notice that I have and claim a lien upon said building

and appurtenances, and the lot upon which the same stand, as security for the amount due me, as aforesaid, in pursuance of the statute in such case made and provided. [*Claimant's Signature.*]

No. 153.

Notice of Lien by other person than Contractor.

See ante, p. 251.

To J. M. C., Town Clerk of the town of —— in the county of ——.

Take notice, that I, C. D. a resident of the village of ——, in said county, have a claim against A. B., who was the contractor with E. F. of said village, for the erection of the building and appurtenances, hereinafter mentioned, amounting to the sum of —— dollars, for three months' labor performed for the said A. B., as a carpenter and joiner [*or*, for large quantities of lumber furnished to, and used by the said A. B.], in pursuance of an agreement with him. That the said labor was performed [*or*, the said materials were furnished and used] in erecting the building No. —— and appurtenances situated on Main street in said village; and thirty days have not elapsed since the performance of such labor [*or*, since the said materials were furnished.] That the said E. F., is the owner, *&c.* [*conclude as in the last form from the asterisk*]

No. 154.

Contractor's Notice to Enforce Lien.

See ante, p. 255.

In Supreme Court [*or*, In the County Court, —— county].

A. B., Claimant,
against
E. F., Owner.

To E. F. above named, owner of the building and premises hereinafter mentioned,

Take notice, that I, A. B., above-named, residing within the county of ——, have a claim against you, amounting to the sum of —— dollars, with interest thereon from the —— day of —— last, for three months' labor performed for you as a carpenter and joiner [*or*, for large quantities of lumber furnished to you and used by you], in pursuance of an agreement with you, the same being fully set forth in the bill of particulars hereto annexed; and which labor was performed [*or*, which materials were furnished and used] in erecting the building No. ——

and appurtenances owned by you, situated on Main street (*) in the village of ——, in the town of ——, in said county, the lot upon which the same stand being bounded and described as follows: [*describe premises.*]

Also take notice that within thirty days after the performance and completion of such labor [*or*, the final furnishing of such materials], to wit, on the —— day of ——, 18—, I duly filed with the town clerk of said town of ——, the notice required by law to effect a lien on the building and premises above mentioned, owned by you as aforesaid, for the amount of the claim above stated, to wit, for the sum of —— dollars, and interest as aforesaid.

You will therefore also take notice, that you are required to appear in person or by attorney, within thirty days after the service of this notice, and answer the same, and to serve upon me or my attorney, a copy of your answer, together with a notice of any set-off that you may have; or in default thereof, I will take judgment against you for the amount claimed as aforesaid, to wit, the sum of —— dollars, and interest thereon from the —— day of ——, 18—, together with the costs of this action. Dated, *&c.*

L. P. C., Attorney for Claimant, A. B., Claimant.

[*Annex bill of particulars—See form in No.* 156, *post.*]

No. 155.

Notice to enforce Lien by other person than Contractor.

See ante, p. 255.

In Supreme Court [*or other court, as in last form*].

C. D. Claimant,
against
E. F., Owner.

To E. F., above named, owner of the building and premises hereinafter mentioned.

Take notice, that I, C. D., above named, residing within the county of ——, have a claim against A. B., of the village of ——, in said county, who was the contractor with you for the erection of the building and appurtenances hereinafter mentioned, amounting to the sum of —— dollars, with interest thereon from the —— day of —— last, for three months' labor performed for the said A. B., as a carpenter and joiner [*or*, for large quantities of lumber furnished to and used by the

said A. B.], in pursuance of an agreement with him, the same being fully set out in the bill of particulars hereto annexed; and which labor was performed [*or*, which materials were furnished and used] in erecting the building No. — and appurtenances, owned by you, situated on Main street, *&c.* [*conclude as in the last form from the asterisk*]. [*Signed*,] C. D., Claimant.

O. F. C., Attorney for Claimant.

[*Annex bill of particulars. See No.* 156.]

No. 156.

Claimant's Bill of Particulars.

See ante, p. 255.

Bill of Particulars referred to in the annexed notice, being a bill of particulars of the amount claimed to be due from E. F., the owner mentioned in said notice [*or*, A. B., the contractor mentioned in said notice], for the work performed [*or*, the materials furnished] as therein mentioned, to wit:

E. F., owner [*or*, A. B., contractor].

To A. B., contractor [*or*, C. D., laborer, *or as the case may be*], Dr.

1858.

Aug. 1. To, *&c.* [*set out the length of time the claimant was in the employment of the owner, or contractor, the time when the labor was performed, and the price or value of the same; and if the claim is for materials furnished, set out the items in full, and the price of the same, &c.*]

County of ——, ss.: A. B. [*or*, C. D.], the above-named claimant, being duly sworn, says, that the bill of particulars above mentioned is in all respects true.

No. 157.

Affidavit of Service of Notice and Bill of Particulars.

See ante, pp. 255, 256.

[*Title.*] County of ——, ss. H. S., of ——, in said county, being duly sworn, says: That on the —— day of ——. 18—, he personally served a copy of the annexed notice and bill of particulars upon E. F., the owner mentioned therein, by delivering the same to, and leaving the same with, the said E. F., at his residence in the village of ——, in said county. And deponent further says, that he knew the person so

served to be the person mentioned and described in said notice as owner and defendant therein. H. S.

Sworn, *&c.*

No. 158.

Affidavit of Facts justifying Service by Publication.

See ante, pp. 255, 256.

[*Title.*] County of ——, ss. H. S., of ——, in said county, being duly sworn, says: That he is acquainted with E. F., the owner mentioned in the annexed notice; that the said E. F. is now absent from this State, and has been so absent for —— days, or more, last past. [*Or*, that deponent has made diligent inquiry to find the said E. F., for the purpose of serving him with a copy of the notice and bill of particulars annexed, and has been several times to his house with a view of making such service, and has looked and inquired in other places for said E. F.; that said E. F. was well aware that deponent was looking for him to make such service, and kept out of the way purposely, as deponent believes, to avoid said service].

And deponent further says, that on the —— day of ——, 18—, he left a copy of said notice and bill of particulars annexed at the last place of residence of the said E. F., in the village of ——, with the wife of said E. F. [*or other person if there.*] H. S.

Sworn, *&c.*

No. 159.

Affidavit of Publication of Notice.

See ante, pp. 255, 256.

[*Title.*] County of ——, *ss.* E. D. B., of ——, in said county, being duly sworn, says, he is the publisher [*or*, printer *or*, foreman, of the —— Herald, a newspaper printed in said county of ——, and that the annexed printed notice was published in the said newspaper three weeks successively, at least once in each week; which publication commenced on the —— day of ——, 18—, and terminated on the —— day of ——, 18—. E. D. B.

[*Attach here a printed copy of notice.*]

Sworn, *&c.*

No. 160.

Affidavit of Owner's Default.

See ante, p. 256.

[*Title.*] County of ——, ss. L. P. C., being duly sworn, says,

he is the attorney for A. B., the plaintiff in the above action; that this action was commenced to enforce a lien against real property owned by the defendant above named, and the notice and bill of particulars herein were served on the defendant on the —— day of ——, as appears by the affidavit of H. S., hereto annexed.

And deponent further says, that no answer or copy of answer has been received herein by deponent, nor has the defendant appeared in this action. L. P. C.

Sworn, *&c.*

No. 161.

Judgment on Failure of Owner to Appear.

See ante, p. 257.

Judgment, August 20, 1858.

[*Title, as in Nos.* 154 *or* 155.] The notice and bill of particulars, in the above action, having been personally served on E. F., the owner and defendant above named, more than thirty days previous to this date, and no copy of an answer to the same having been served upon the plaintiff's attorney as required by said notice; and due proof of the service of such notice and bill of particulars, and of the defendant's failure to appear as aforesaid, having been made and filed; and the plaintiff having also given evidence showing that he has acquired a valid lien upon the building and premises of the defendant, situated in the village of ——, in the county of ——, and which premises are particularly described in said notice; and also evidence to establish the value of the labor performed [*or*, materials furnished] by the plaintiff, as stated in said notice, and that the same was performed for [*or*, used by] the said defendant [*or*, A. B., the original contractor with said defendant, as stated in said notice], in the erection of the building above mentioned and the appurtenances thereto; and the plaintiff's claim having been assessed by the court [*or*, by the clerk of said county] at the sum of —— dollars;

Now, therefore, on motion of L. P. C., attorney for the plaintiff, it is ordered and adjudged, that the plaintiff recover of E. F., the owner and defendant above named, the sum of —— dollars and —— cents, with —— dollars and —— cents costs and disbursements, amounting in the whole to —— dollars and —— cents.

No. 162.

Answer of Owner.

See ante, p. 257.

[*Title, as in No.* 154, *or* 155.] The defendant, E. F., above named,

in answer to the notice of the above-named C. D. [*or*, A. B.], says: [*Set forth the defences which the defendant has to the plaintiff's claim, as in an answer in an ordinary action.*]

The said defendant in further answering said notice says: That the said plaintiff, C. D., is indebted to him in the sum of —— dollars, for moneys loaned and advanced to the plaintiff, from time to time, and which moneys are fully set out in the bill of particulars hereto annexed.

[The defendant also says, in further answering said notice, that A. B., the contractor mentioned therein, is also indebted to him in the sum of —— dollars, for moneys loaned and advanced to the said A. B. during the time the building mentioned in said notice was in the progress of erection,—the items of which are set forth in said bill of particulars annexed.]

And the defendant claims to set off the demands above mentioned, and set out in said bill of particulars, against the claim of said plaintiff, as stated in said notice. E. F., Owner.

E. H., Attorney for owner.

County of ——, ss.: E. F., the owner above named, being duly sworn, says: That the foregoing answer is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true. E. F.

Sworn, *&c.*

Bill of Particulars.

Bill of Particulars of set-off claimed by E. F., owner, in the action commenced by ——, to enforce a lien under the statute, and mentioned in the answer of E. F., hereto annexed, viz:

Moneys loaned by the said E. F. to C. D., at the times and to the amounts following:

1858.

June 1. To cash lent this day . . . $200 00

" 6. To, *&c.* [*set out items*].

[Moneys advanced by E. F., above-named, to A. B., the contractor mentioned in the notice to enforce said lien, at the times and to the amounts following:

1858.

Aug. 1. To, *&c.* (*set out the items and amounts.*)]

E. F., Owner.

No. 163.

Judgment on Issue and Trial.

See ante, p. 260.

[*Title as in No.* 154.] Judgment, Nov. 1, 1858.

This action being at issue upon the claimant's notice and bill of particulars to enforce his lien, and the owner's answer and bill of particulars of set-off annexed thereto; and the issue being an issue of fact and triable by the court; and such issue being tried by the court on the —— day of ——, 18—, the Hon. E. H. R., justice [*or*, county judge], presiding, whose decision, in writing, has been filed with the clerk of this court, whereby judgment is ordered against the said E. F., owner, in favor of the above-named claimant, for —— dollars, with costs and disbursements against said owner, to be taxed.

Now, on motion of L. P. C., Attorney for A. B., the above plaintiff, it is ordered and adjudged that the said plaintiff recover of E. F., owner, above named, the aforesaid sum of —— dollars, together with the sum of —— dollars costs and disbursements, amounting in the whole to the sum of —— dollars.

No. 164.

Execution Against the Property Covered by Lien.

See ante, p. 261.

The People of the State of New York: To the Sheriff of the county of ——. Greeting:

Whereas, judgment was rendered on the —— day of ——, one thousand eight hundred and fifty ——, for the sum of —— dollars, in favor of A. B., plaintiff, against E. F., defendant, in an action in the Supreme Court [*or*, county court of the county of ——], commenced against the said E. F., as owner, to enforce a lien under the statute existing in favor of the said A. B., as claimant, against the building No. ——, on Main street, in the village of ——, in said county, and the lot of land and premises upon which the same stands, and which lot and premises is bounded and described as follows: [*describe premises.*]

And whereas, the said E. F. was the owner of said building and premises at the time said lien was created, to wit: on the —— day of ——, 18—;

And whereas, the said lien was created to secure a claim for three months' labor performed by the said A. B., for the said E. F., as a carpenter and joiner [*or*, for large quantities of lumber which the said A. B. furnished to, and which were used by, the said E. F.], in erect-

ing the building, aforesaid, and the appurtenances thereto; which matters, above recited, will more fully appear by the judgment roll filed in the office of the clerk of the county of ——, reference being thereunto had;

And whereas, the said judgment was docketed in your county on the —— day of ——, 18—, and the sum of —— dollars, with interest thereon from the —— day of ——, 18—, is now actually due upon said judgment. (*)

Therefore, we command you, that you sell the right, title and interest which the said E. F., owner, as aforesaid, had in the building and premises above mentioned, at the time the notice creating said lien was filed, to wit: on the —— day of ——, 18—, and out of the avails of said sale that you satisfy the amount of said judgment, and return this execution within sixty days after its receipt by you to the clerk of the county of ——.

Witness, E. H. R., Esq., Justice of the Supreme Court [*or*, county judge of said county], the —— day of ——, 18—.

L. P. C., Attorney for Plaintiff.

[*To be indorsed:*]

[*Title.*]

To the sheriff of the county of ——: Levy, as within directed, the sum of —— dollars, with interest thereon from the —— day of ——, 18—, besides your fees.

L. P. C., Plaintiff's Attorney.

No. 165.

Execution Against Real Estate Generally.

See ante, p. 262, and notes.

[*As in the last form to the* (*), *and then continue:*]

Therefore, we command you, that you satisfy the said judgment out of the real property in your county belonging to said defendant on the day when the said judgment was so docketed in your county, or at any time thereafter, and return this execution within sixty days after its receipt by you, to the clerk of the county of ——.

Witness, *&c.* [*as in last form.*

No. 166.

Contractor's Notice to Enforce Lien in Justice's Court.

See ante, p. 263.

In Justice's Court, before A. B. L., Justice.

A. B., Claimant,
against
E. F., Owner.

To E. F., above named, owner of the building and premises hereinafter mentioned.

Take notice, that I, A. B. above named, residing within the county of ——, have a claim against you, amounting to the sum of —— dollars, with interest thereon from the —— day of —— last, for three months' labor performed for you as a carpenter and joiner [*or*, for large quantities of lumber furnished to you and used by you], in pursuance of an agreement with you, the same being fully set forth in the bill of particulars hereto annexed; and which labor was performed [*or*, which materials were furnished and used] in erecting the building No. ——, and appurtenances, owned by you, situated on Main street, (*) in the village of ——, in the town of ——, in said county; the lot upon which the same stand being bounded and described as follows: [*describe premises.*]

Also take notice, that within thirty days after the performance and completion of such labor [*or*, the final furnishing of such materials], to wit: on the —— day of ——, 18—, I duly filed with the town clerk of said town of ——, the notice required by law to effect a lien on the building and premises above-mentioned, owned by you, as aforesaid, for the amount of the claim above stated, to wit: for the sum of —— dollars, and interest as aforesaid.

You will, therefore, also take notice, that you are required to appear, in person or by attorney, before A. B. L., Esq., a justice of the peace in and for said town, at his office in said town, on the —— day of —— next, (*a*) at ten o'clock, A. M., and answer this notice, or in default thereof, I, the said claimant, will take judgment against you for the amount claimed, as aforesaid, to wit: the sum of —— dollars, and interest thereon from the —— day of ——, 18—, with costs.

Dated, *&c.* A. B., Claimant.

L. P. C., Att'y for claimant.

[*Annex bill of particulars—see form in No.* 156, *ante.*]

(*a*) The time must be not less than thirty days after the service of the notice. *See ante, p.* 263.

No. 167.

Like Notice in Justice's Court, by other Person than Contractor.

See ante, p. 263.

In Justice's Court—Before A. B. L., Justice.

C. D., Claimant,
against
E. F., Owner.

To E. F., above named, owner of the building and premises hereinafter mentioned:

Take notice, that I, C. D., above named, residing within the county of ——, have a claim against A. B., of the village of ——, in said county, who was the contractor with you for the erection of the building and appurtenances hereinafter mentioned, amounting to the sum of —— dollars, with interest thereon from the —— day of —— last, for three months' labor performed for the said A. B., as a carpenter and joiner [*or*, for large quantities of lumber furnished to and used by the said A. B.], in pursuance of an agreement with him, the same being fully set out in the bill of particulars hereto annexed, and which labor was performed [*or*, which materials were furnished and used], in erecting the building No. ——, and appurtenances, owned by you, situated on Main street, *&c.* [*conclude as in the last form from the asterisk*].

[*Signed.*] C. D., Claimant.

O. F. C., Att'y for Claimant.

[*Annex bill of particulars, as in No.* 156, *ante.*]

No. 168.

Claimant's Bill of Particulars.

See ante, p. 264.

[*Same as in No.* 156, *ante.*]

No. 169.

Affidavits of Service of Notice, &c., on failure to Appear.

See ante, p. 264.

[*For forms of affidavits of service of notice, persona land by publication, and of affidavit of facts justifying service by publication, see Nos.* 157, 158, 159, *ante.*]

No. 170.

Affidavit of Owner's Default in Justices' Court.

See ante, pp. 264, 265.

[*Title.*]

County of —— ss. A. B., above named [*or*, L. P. C., attorney for A. B., above named], being duly sworn says: He is the plaintiff [*or*, attorney for the plaintiff] in the above action. That this action was commenced to enforce a lien against real property owned by the defendant above named; and the notice commencing the same is returnable before A. B. L., Esq., justice of the peace, at his office in the town of ——, on the —— day of ——, at 10 o'clock A. M., as will more fully appear by said notice hereto annexed.

And deponent further says: That the said E. F., has not appeared before the said justice as required by said notice, and that one hour and over has elapsed since the time fixed in said notice for the appearance of said defendant. [*Signature of Deponent.*]

Sworn, *&c.*

No. 171.

Owner's Answer, before Justice.

See ante, p. 265.

[*Title as in suit before a justice; and then proceed the same as in No.* 162, *ante, including the verification and bill of particulars there given.*]

No. 172.

Notice Requiring Claims to be Presented.

See ante, p. 266.

To all persons having claims under any of the provisions of the act entitled "an act for the better security of mechanics and others erecting buildings in the counties of Westchester, Oneida, Cortlandt, Broome, Putnam, Rockland, Orleans, Niagara, Livingston, Otsego, Lewis, Orange and Dutchess," passed April 17, 1854 [and the act to extend the provisions of the above-recited act, to all the counties of this State, except the city and county of New York and the county of Erie, passed April 14, 1858], against the building No. —— and appurtenances, owned by the undersigned, and the land upon which the same stand, and which is situated in the town of ——, in the county of ——, and is described as follows: [*insert brief description of premises*], at the time of the first publication of this notice, (to wit: the day —— of —— 18—.)

TAKE NOTICE, That you are required to present the said claims, with vouchers in support thereof, to A. B. L., Esq., a justice of the peace of said town, at his office in said town, on or before the 17th day of November next [*or*, on or before 10 o'clock A. M., of the 17th day of November next]. Dated, October 5th, 1858.

E. F., Owner.

No. 173.

Notice Requiring Claimant to Commence an Action to enforce his Lien.

See ante, pp. 253, 267.

To A. B. [*or*, C. D.], claimant. You will take notice, that you are required, within twenty days after the service of this notice, to commence an action to enforce a lien created by you on the —— day of —— 18—, against the building No. —— and appurtenances, and the lot upon which the same stand, owned by E. F., to secure an alleged claim for —— dollars, alleged to exist against the said E. F., as owner [*or*, against A. B., as contractor].

The building and premises, above mentioned, are described in the notice, creating said lien, as follows: [*insert description*]. Dated, *&c.*

E. F., Owner [*or*, T. C., Attorney for E. F., the owner above named; *or*, A. B., contractor; *or*, C. D., sub-contractor].

No. 174.

Affidavits of Service of No. 173, *and that Action is not commenced.*

See ante, pp. 253, 267.

County of —— ss: H. S., of ——, in said county, being duly sworn, says: That on the —— day of ——, 18—, he personally served a notice, of which the above is a copy, upon A. B. [*or*, C. D.], the claimant mentioned therein, by delivering the same to, and leaving the same with, the said A. B. [*or*, C. D.], at his residence in the village of ——, in said county. And deponent further says: That he knew the person so served to be the person mentioned and described in said notice as claimant therein. H. S.

Sworn, *&c.*

County of ——, ss.: E. F., being duly sworn, says. That more than twenty days have elapsed since the service of the notice, mentioned in the affidavit of H. S., hereto annexed; and that no action has been commenced against him to enforce the lien mentioned in said notice. E. F.

Sworn, *&c.*

No. 175.

Satisfaction of Lien.

See ante, p. 269.

[*Same substantially as in No.* 151, *ante.*]

CHAPTER VIII.

FORMS IN MANDAMUS AND PROHIBITION.

No. 176.

Affidavit on Application for Mandamus.

See ante, p. 285.

State of New York, }
County of ——, ss. } A. B., of ——, in said county, being duly sworn, says: That, *&c.* [*set forth the facts to show that the relator is entitled to the writ, and to the relief demanded*]. A. B.

Sworn, *&c.*

No. 177.

Notice of Motion for a Writ of Mandamus.

See ante, pp. 286, 287.

To C. D.

SIR: You will take notice that I shall move the Supreme Court, at the next special term thereof, to be held at the Court House, in the village [*or*, city] of ——, on the —— day of —— instant, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order (*) that a writ of mandamus issue out of the said court, directed to you, and commanding you that, *&c.* [*state the object of the writ*], or, for such other or further relief as the court may be pleased to grant; which motion will be founded upon the affidavits, with copies whereof you are herewith served.

Dated, *&c.*, Yours, &c,

L. P. C., Atty. for A. B.

No. 178.

Order that a Mandamus Issue.

See ante, p. 288.

At a special term of the Supreme Court held at the Court House in ——, in and for the county of ——, on the —— day ——, 18—.
Present, Hon. P. P., Justice.

In Supreme Court.

The People *ex rel.* A. B.,
vs.
C. D.

On reading and filing the affidavits of A. B., the relator above-named, and of S. R., dated the —— day of ——, 18—, and on motion of L. P. C., Esq., counsel for the relator, (*) [after hearing C. H., Esq., in opposition thereto], it is ordered, that a mandamus issue out of and under the seal of this court, directed to the said C. D., commanding him forthwith to, *&c.*, [*state what is required to be done*], or that the said C. D. show cause to the contrary before this court at the next special term thereof, to be held at the Court House in ——, on the —— day of —— next.

No. 179.

Order to Show Cause why Mandamus should not Issue.

See ante, pp. 286 to 288.

[*Same as in No.* 178, *to the asterisk*, (*) *and then continue:*] it is ordered that C. D., above-named, show cause, at the next special term of this court, to be held [*or*, at the special term of this court now sitting], at the Court House in ——, on the —— day of —— instant, why the said C. D. should not be compelled forthwith, *&c.*, [*state the matters required to be done*] or why an alternative mandamus should not issue directed to the said C. D., in the usual form, and requiring him to do the acts above mentioned, or to show cause, &c.

And it is further ordered that a copy of this order, together with a copy of the affidavits on which the same is founded, be served on the said C. D., —— days before the time above mentioned.

No. 180.

Alternative Mandamus—general form. (*a*)

See ante, pp. 288 to 291.

The People of the State of New York, to C. D. [*or, the court, commissioners or other officers, or persons to whom it is directed*], greeting:

[L. S.] Whereas, [*here recite the facts or statements, briefly, which preceded the gravamen or injury*]. Nevertheless, you the aforesaid C. D. [*or court, or officer*], have unjustly [*state briefly the order or proceeding complained of*], as we are informed by the complaint of the said A. B.

Now, therefore, we being willing that full and speedy justice be done in this behalf to him, the said A. B., do therefore command you, that immediately after the receipt of this writ, you, *&c.* [*insert the matter required to be done, or omitted, substantially according to the order of the court allowing the mandamus*], or that you show cause to the contrary thereof, before our Supreme Court, at the next special term thereof to be held at the Court House in ——, on the —— day of ——, next, lest complaint shall again come to us by your default; and in what manner you shall have executed this our writ make known to our Supreme Court, at the next special term thereof, to be held at the time and place aforesaid.

Witness C. L. A., Justice of the Supreme Court, at ——, the —— day of ——, 18—.

L. P. C., Attorney. N. B. M., Clerk.

[*Endorsed:*] "By the Court,"
N. B. M., Clerk.

No. 181.

Answer or Return to Alternative Writ.

See ante, p. 293.

The Answer or Return of C. D., to the alternative writ of mandamus within mentioned.

I, the said C. D., do answer and return to the Supreme Court, within mentioned, that, *&c.* [*deny the facts alleged in the writ, or set forth other facts in avoidance of the relator's claim.*] C. D.

(*a*) For a variety of forms of alternative mandamus, in particular cases, see 2 *Johns. Cas.*, 2*d. ed.* 217—81 *to* 90, *notes.*

Another Form.

See Yates' Pl. 760.

The Answer of the Mayor, Aldermen and Commonalty of the city of ——, within mentioned.

We, the said Mayor, Aldermen and Commonalty, do certify to the Supreme Court, within mentioned, that the within named A. B. was not elected an alderman, as by the within writ is within alleged; and therefore, we could not cause him to be sworn nor admitted, as by that writ we were within commanded.

C. D., Mayor. [*Seal of Corporation.*]

No. 182.

Notice requiring Relator to Demur or Plead.

See ante, p. 295.

[*Title.*] To L. P. C., Attorney for the relator [*or*, To A. B., the above-named relator]: Sir—You will take notice that the defendant's return to the writ of mandamus in this cause, has been duly filed with the clerk of —— county; and that you are required to demur or plead to the said return within twenty days after the service of this notice.

Dated, *&c.* Yours, &c.,

C. H., Att'y for the defendant.

No. 183.

Notice of Hearing, on failure of Relator to Demur or Plead.

See ante, p. 296.

[*Title.*] To C. H., Attorney for the defendant [*or*, To L. P. C., Attorney for the relator]: (*a*)

Sir: You will please take notice that the above matter will be brought to a hearing on the return to the writ of mandamus in this matter, at the next special term of this court, to be held at the Court House in ——, on the —— day of ——, instant, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated, the —— day of ——, A. D., 18—.

Yours, &c., L. P. C., Att'y for relator.

[*Or*, C. H., Att'y for defendant.]

(*a*) Either party may notice the matter for hearing. *See ante, p.* 296.

No. 184.

Judgment Record on Mandamus.

See ante, p. 299; and Yates' Pl., 760; 3 Bur. Pr., 523.

SUPREME COURT. Pleas before the Justices of the Supreme Court of Judicature of the People of the State of New York, at the City Hall in the city of ——, of the term of —— [*term of which judgment is entered*], in the year of our Lord one thousand eight hundred and ——.

Witness, W. M., Esq., Presiding Justice.

R. B. C., Clerk.

State of New York, ss. The People of the State of New York (*) sent to [the Mayor, Aldermen, and Commonalty of the city of New York], their writ close in these words, to wit:

The People of the State of New York, *&c.* [*insert copy of mandamus in full*].

The answer of the Mayor, Aldermen, *&c.* [*insert copy of return in full*].

[*If an issue in fact is joined, the entries upon the record will be as follows:*]

And now, at this day, to wit, on, *&c.*, before the justices aforesaid, at, *&c.*, come as well the said A. B. by E. F., his attorney, as the said mayor, aldermen, and commonalty, by G. H., their attorney. And the said A. B., by his said attorney, says, that he was duly elected an alderman of the —— ward of the said city, as in the said writ is above alleged; and this the said A. B. prays may be inquired of the country. And the said Mayor, Aldermen, and Commonalty, by their said attorney, do the like, &c.

It is therefore ordered by the Supreme Court, that the issue above joined be tried at the Circuit Court, appointed to be held at the —— in the city of ——, on the —— day of ——, one thousand eight hundred and ——.

Afterwards, to wit, on the day and at the place last mentioned, before H. E. D., Esq., one of the justices of the Supreme Court of the State of New York, according to the form of the statute in such case made and provided, come as well the above named A. B., as the above named mayor, aldermen and commonalty, by their respective attorneys, above mentioned; and the jurors of the jury, summoned to try the said issue, being called also come; who to speak the truth of the matters above

contained, being chosen, tried and sworn, say upon their oath that the said A. B. was duly elected an alderman, in manner and form as by the said writ of mandamus is within alleged; and they assess the damages which the said A. B., has sustained by reason of his not being sworn and admitted into the said office, as alleged in the said writ, over and above his costs and charges by him about his writ in this behalf expended, at —— dollars, and for those costs and charges to six cents. Whereupon the said A. B. prays judgment, and also, the people's writ of peremptory mandamus, to be directed to the said mayor, aldermen and commonalty, commanding them to cause the said A. B. to be sworn and admitted into the said office of aldermen, &c.

Therefore it is considered that the said A. B. recover against the said mayor, aldermen and commonalty his damages aforesaid by the jurors aforesaid, in form aforesaid found, and also —— dollars and —— cents, for his costs and charges by the court now here adjudged to the said A. B.; which said damages, costs and charges, in the whole, amount to —— dollars and —— cents. And it is further considered that the people's writ of mandamus do forthwith issue, directed to the said mayor, aldermen and commonalty, commanding them upon pain and peril that shall fall thereon, to cause the said A. B. to be immediately sworn and admitted into the aforesaid office of alderman, according to the command of the said former writ of alternative mandamus, &c.

Judgment signed the —— day of ——, 18—. R. B. C., Clerk.

[*If the verdict was against the plaintiff, make the necessary alterations in the above, according to the fact, and then proceed as follows in respect to the judgment*].

It is therefore considered that the said mayor, aldermen, and commonalty, recover against the said A. B., —— dollars and —— cents, for their costs and charges by them laid out and expended in and about their defence to the said writ of mandamus, adjudged to the said mayor, aldermen, and commonalty, by their assent; and that they have execution therefor, &c.

No. 185.

Peremptory Mandamus,—General Form.

See ante, pp. 286, 300.

The People of the State of New York to C. D. [*or, the other court, commissioners, or other officers, or persons to whom it is directed*] greeting:

Whereas, [*here recite the facts or statements, briefly, which preceded the gravamen or the injury*]. Nevertheless, you, the aforesaid —— [*court, officer, or person*], have unjustly [*state briefly the order or proceeding complained of*], as we are informed by the complaint of A. B., and which complaint we have adjudged to be true as appears to us of record. Now, therefore, we being willing that full and speedy justice be done in this behalf to him the said A. B. as it is just, command you, firmly enjoining, that immediately after the receipt of this writ, you, *&c.* [*insert the thing or matter required to be done, substantially according to the order of the court allowing the mandamus*], lest complaint shall again come to us by your defaults; and in what manner this our command shall be executed, make appear to our said Supreme Court, on the —— day of ——, at the Court House, in ——; then and there returning this our writ.

[L. S.]

Witness, C. D. A., Justice of the Supreme Court, at ——, the —— day of ——, 18—. N. B. M, Clerk.

L. P. C., Attorney.

[*Endorsement as in No.* 180.]

No. 186.

Notice of Motion for Writ of Prohibition.

See ante, p. 310.

[*Same substantially as in No.* 177, *to the asterisk, and then continue:*] That a writ of prohibition issue, directed to the county court, of the county of ——, [*or other court to be restrained*], and to C. D., and commanding them to desist and refrain from any further proceedings in, *&c.*, [*state the suit or matter sought to be prohibited*]; or for such other or further relief as the court may be pleased to grant; which motion will be founded upon the affidavits, copies of which are herewith served. Dated, *&c.*

Yours, &c., L. H. N., Attorney for A. B.

No. 187.

Affidavit on Application for Writ of Prohibition.

See ante, p. 310.

[*Same form as in No.* 176, *ante.*]

No. 188.

Order that a Writ of Prohibition issue.

See ante, p. 310.

[*Same substantially as in No.* 178, *to the asterisk, and then pro-*

ceed:] After hearing U. G. P., Esq., in opposition thereto, it is ordered that a writ of prohibition issue out of and under the seal of this court, directed to the county court of the county of —— and to C. D., commanding them to desist and refrain from any further proceedings in, *&c.* [*state the suit or matter sought to be prohibited*], until the next term of this court, to be held at the Court House in ——, on the —— day of ——, 18—, and until the further order of the court thereon, and that they show cause at the time and place last aforesaid, why they should not be absolutely restrained from any further proceedings in such suit or matter.

No. 189.

Writ of Prohibition.

See ante, p. 310.

The People of the State of New York, to the county court, [L. S.] of the county of ——, [*or other court to be restrained*], and to C. D., greeting.

Whereas, A. B., of, *&c.*, lately in our Supreme Court of judicature, at the Court House in ——, on the —— day of ——, 18—, represented to our said court that, *&c.* [*state the facts and proceedings complained of*]. (*)

Nevertheless you, the said county court, aforesaid [*or other court*], and the said C. D., well knowing the premises, yet contriving, as it is said, the said A. B. unjustly to aggrieve and oppress, have [*state the grievance*], in contempt of us, against the laws and customs of our said State, and to the manifest damage, prejudice and grievance of him the said A. B.; wherefore the said A. B. has prayed relief, and our writ of prohibition in that behalf. We, therefore, being willing that the laws and customs of our said State should be observed, and that our citizens should in no wise be oppressed, do command you that you desist and refrain from any further proceedings, in, *&c.* [*state the matters to be prohibited*], until the next term of this court to be held at the Court House in ——, on the —— day of ——, 18—, and until the further order of the court thereon; and that you show cause, before our said court, at the time and place last aforesaid, why you should not be absolutely restrained from any further proceedings in such suit or matter,—And have you then there this writ.

Witness C. L. A., Justice of the Supreme Court, at ——, the —— day of ——, 18—.

L. H. N., Attorney. N. B. M., Clerk.

[*Endorsed:*] "By the Court."

N. B. M., Clerk.

No. 190.

Return to Alternative Writ of Prohibition.

See ante pp. 311, 312.

[*Same substantially, as in cases of Mandamus, see ante, No.* 181.]

[*If the party adopts the return of the Court, then annex to the return the following:*]

[*Title.*] I, C. D., the party to whom the writ of prohibition hereto annexed, is directed, do hereby adopt the return of the County Court, hereto annexed, and rely upon the matters contained in said return, as sufficient cause why such court should not be restrained as mentioned in said writ.

In witness whereof, I have hereunto subscribed my name this —— day of ——, 18—. C. D.

No. 191.

Notice, requiring Relator to Demur or Plead.

See ante, p. 311.

[*Same as in No.* 182, *with necessary alterations.*]

No. 192.

Notice of hearing on failure of Relator to Demur or Plead.

See ante, p. 311.

[*Same as in No.* 183, *ante, with necessary alterations.*]

No. 193.

Judgment record on Prohibition.

See ante, p. 312.

[*Same substantially as in No.* 184, *to the asterisk* (*) *and then continue:*] Sent to the County Court, of the county of —— [*or other court*], and to C. D., their writ of prohibition, close in these words, to wit: [*insert the writ of prohibition.*]

At which day and place named in the return of said writ before the said Supreme Court, come as well the said A. B., by L. H. N., his attorney, as the said County Court by U. G. P., their attorney. And the said County Court, now here, makes return to the said writ, and shows cause as follows, to wit: [*insert return*], and which return, is, by an instrument in writing signed by said C. D., adopted by him,—which said writing is in the words following: [*insert the writing*].

And hereupon the said A. B. says, that he, by reason of anything in that return alleged and set forth, ought not to be barred or precluded from having a prohibition absolute restraining the said County Court and the said C. D., from [*state what*], because he says that, *&c.* [*insert the relator's plea*].

And the said C. D., says, that the said writ of prohibition absolute prayed for by said A. B. ought not to issue because, *&c.* [*insert the other pleadings of the parties, if any, to issue, after which, proceed with the record as in No.* 184. *If judgment is rendered for the relator, the further entry will be as follows :*]

Judgment signed this —— day of ——, 18—. N. B. M., Clerk.

Therefore it is considered that the people's writ of prohibition absolute do issue, restraining [*state whom and what*]. And it is further considered, *&c.* [*add a judgment for costs, substantially as in No.* 184.]

[*If judgment is rendered for the defendant, let the entry be thus :*]

Therefore, it is considered, that the said C. D. go thereof without day, &c. And it is further considered, that the people's writ of consultation do issue, authorizing the said County Court and the said C. D., to proceed in, *&c.* [*state what*]. And it is further considered, *&c.* [*judgment for costs—see No.* 184.]

No. 194.

Writ of Prohibition—Absolute.

See ante, p. 312.

[*Same as in No.* 189 *to the* (*), *and then as follows :*]

Nevertheless you, the said county court, aforesaid [*or other court*], and the said C. D., well knowing the premises, yet contriving the said A. B. unjustly to aggrieve and oppress, have [*state the grievance*], in contempt of us, against the laws and customs of our said state, and to the manifest damage, prejudice and grievance of him, the said A. B. Wherefore the said A. B. has prayed relief, and our writ of prohibition in that behalf. We, therefore, having determined that the said A. B. is entitled to the said writ of prohibition, and to the said relief prayed for, do command you, that you absolutely desist and refrain from any further proceedings in, *&c.* [*state the matters to be prohibited*].

Witness *&c.* [*as in No.* 189, *to the end*].

No. 195.

Writ of Consultation.

See ante, p. 312.

The People of the State of New York, to the county court
[*Seal.*] of the county of —— [*or other court*], and to C. D. greeting:

Whereas, A. B., of, *&c.*, lately prosecuted and caused to be directed

to you, our certain writ of prohibition out of our Supreme Court, at a special term thereof, held at the Court House in ——, on the —— day of ——, 18—, that you should not, *&c.* [*state what the writ of prohibition commanded*], by pretense of which prohibition you have thence hitherto delayed, and yet do delay, further to proceed in [*state what*], as we have understood.

And our said Supreme Court having determined that the said A. B. was not entitled to the said writ of prohibition, and the said C. D., having prayed our aid and assistance in this behalf; and we, being willing that there should be no further delay in [*state the proceeding*]. Because in our said Supreme Court, at, *&c.*, it is in such manner provided that it is considered by the said court, that a writ of consultation may issue, our said writ of prohibition to the contrary thereof notwithstanding. We, therefore, being unwilling that the said C. D. should in any wise be injured in this behalf, do hereby authorize you to proceed in the said cause or matter, and further to do what you shall know to belong thereto, our said writ of prohibition to the contrary thereof in any wise notwithstanding.

Witness, *&c.* [*as in No.* 189, *to the end*].

CHAPTER IX.

FORMS IN PARTITION.

No. 196.

Notice of Intention to Apply for Appointment of Guardian.

See ante, p. 327. Till. Forms, 619. Yates' Pl. 525.

To C. D., a minor [*or*, To E. F., general guardian of C. D., a minor].

Take notice, that I intend to apply to the Supreme Court [*or*, to the county court of the county of ——, *or other court in which the suit will be brought*], at the next special term of the said court, to be held at the Court-House, in ——, in the county of ——, on the —— day of —— next [*or*, instant], for an order appointing a suitable and disinterested person to be guardian for the said C. D., a minor, who should be a party to the proceedings on an application to be made to the said

court for a partition of, *&c.* [*state the premises and rights of parties, &c., as in No.* 202]. Dated, *&c.*

Yours, &c., A. B.

No. 197.

Affidavit of the Service of the above Notice.

See ante, p. 327.

County of ——, ss. A. B., of, *&c.*, being duly sworn, deposes and says, that he did, on the —— day of —— instant, serve a copy of the above notice on C. D. [*or*, on E. F., the general guardian of C. D.], the minor therein named, by delivering the same to him personally, and leaving the same with him at the village [*or*, city] of ——, in said county. And further deponent says not. A. B.

Sworn, *&c.*

No. 198.

Petition for Appointment of Guardian. (*a*)

See ante, p. 327.

To the Supreme Court of the State of New York [or, to the county court of the county of ——; *or other court*].

The petition of A. B., of the town of ——, respectfully represents, That he intends to apply to the Supreme Court [*or other court*] for a division and partition of certain premises situated in the town of ——, aforesaid, to wit: [*state premises, rights of parties, &c., as in the petition for partition*], according to the respective rights of the said parties interested therein; and for a sale of such premises, if it shall appear that a partition thereof cannot be made without great prejudice to the owners; that C. D. is a minor, who should be a party to the proceedings on that application. And that at least ten days' notice has been served on the said C. D. [*or*, on E. F., the general guardian of the said C. D.], of an intention to apply to this court for an order appointing a suitable and disinterested person to be guardian for the said C. D., for the special purpose of taking charge of the interests of the said minor, in relation to the proceedings for a partition of said premises.

(*a*) In *actions* for partition, the Revised Statutes are inapplicable, so far as they relate to the parties to apply for a guardian, and the time and mode of applying. The Code of Procedure (§ 116) is to govern in such case. *See ante, p.* 322, *note.*

The said A. B., therefore, prays that the court may appoint a suitable and disinterested person to be a guardian for the said minor, for the special purpose of taking charge of the interests of the said minor in relation to the proceedings for a partition of the premises above mentioned. Dated, *&c.* A. B.

L. P. C., Atty. for A. B.

County of —— ss. A. B., the above-named petitioner, being duly sworn, says: That the matters stated in the above petition are true to the best of his knowledge, information, and belief.

Sworn to, *&c.* A. B.

No. 199.

Order of Court Appointing Guardian.

See ante, p. 327.

At, *&c.* [*as in No.* 6.]

SUPREME COURT [*or other court*].

In the matter of the application of A. B., for the appointment of a guardian for C. D., a minor, in proceedings for partition.

On reading and filing the petition of A. B., above named, dated the —— day of ——, 18—, representing that he intends to apply to the Supreme Court [*or other court*], for a division and partition of certain premises, therein described; and that the said C. D. is a minor, who should be a party to the proceedings on such partition; and on reading and filing the affidavit of the said A. B., whereby it is satisfactorily proved that due notice has been served on the said C. D. [*or*, on E. F., the general guardian of the said C. D.], of an intention to apply to this court for the order therein mentioned. Now, on motion of L. P. C., attorney for the said A. B.,—it is ordered that N. O., a suitable and disinterested person, be, and he is hereby appointed guardian for the said C. D., for the special purpose of taking charge of the interests of the said C. D. in relation to the proceedings for a partition of the premises aforesaid. And it is further ordered, that the said N. O., before entering upon the execution of his duties, execute and file with the clerk of this court, a bond, in due form of law, in the penal sum of —— dollars, with R. W., of, *&c.*, as surety, conditioned for the faithful discharge of the trust committed to such guardian, and to render a just and true account of his guardianship in all courts and places when thereunto required.

No. 200.

Bond of Guardian.

See ante, p. 328.

Know all men by these presents, that we, N. O., of, *&c.*, and R. W., of, *&c.*, are held and firmly bound unto the people of the State of New York, in the sum of —— dollars, to be paid to the said people; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the —— day of ——. 18—.

Whereas, the above-bounden N. O. has been appointed by an order of the Supreme Court [*or, other court*], made the —— day of ——, 18—, on the application of A. B., to be guardian for C. D., a minor, for the special purpose of taking charge of the interests of the said C. D., in relation to the proceedings for a partition in the said order mentioned.

Now, therefore, the condition of the above obligation is such, that if the above-bounden N. O. shall faithfully discharge the said trust so committed to him, and shall render a just and true account of his guardianship in all courts and places when thereunto required, then the above obligation to be void, otherwise to remain in full force and virtue.

N. O. [L. S.]
R. W. [L. S.]

Sealed and delivered in the presence of
T. S.

[*Add acknowledgment and justification of surety. See No.* 290.]

No. 201.

Notice of Lis Pendens.

See ante. p. 326.

[*Title, as in No.* 202.] Notice is hereby given to all whom it may concern, that the petition in the above cause is filed against the defendants, J. K., R. D. and C. D., therein named, and against all persons unknown having or claiming any interest in the premises described in said petition, for the purpose of obtaining a partition and division of the said premises, among the owners thereof, by commissioners to be appointed for that purpose; and for a sale thereof under the direction of the Supreme Court [*or other court*], and for a division of the proceeds of such sale among such owners, according to their several rights and interests therein; which premises are described in the said petition as follows, to wit: [*describe the premises*].

Dated, *&c.* L. P. C., Atty. for Petitioner.

No. 202.

Petition for Partition. (*a*)

See ante, pp. 320, 329.

SUPREME COURT [*or other court*].

A. B.
against
J. K., R. D., C. D., and owners unknown.

To the Supreme Court of the State of New York, [*or*, To the County Court of the County of ——, *or other court*].

(*a*) The following are forms of a summons and complaint, &c., in an *action* for partition under the Code of Procedure. For other forms in actions, see the *Appendix*, Nos. 239 to 261, which may be used, with slight alterations; and see notes to Nos. 209, 245. See, also, *ante*, pp. 320 and 322, notes.

I. *Summons.*

SUPREME COURT [*or other court*], County of ——.

C B. D. and A. M. D., his wife, plaintiffs,
against
T. N., J. H. N., W. E. P. and L. A., his wife, and M. H., defendants.

TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned to answer the complaint of C. B. D., and A. M. D, his wife, a copy of which is hereto annexed [*or*, which will be filed in the office of the Clerk of the County of ——], and to serve a copy of your answer on me at my office in the village of ——, in said county, within twenty days after the service of this summons, exclusive of the day of service; and if said defendants fail to answer said complaint, as hereby required, the plaintiffs will apply to the Supreme Court [*or other court*], for the relief demanded in the said complaint.

H. N., Attorney for Plaintiffs.

II. *Complaint.*

[*Title, as in the last form.*] The complaint of the above-named plaintiffs, respectfully shows unto this court, that T B, the grandfather of the said plaintiff, A. M. D., and late of the town of ——, county of ——, and State of New York, now deceased, was, at the time of making his last will and testament, hereinafter mentioned, and also at the time of his death, seized in fee simple and possessed of all those certain farms, pieces or parcels of land, situated, lying and being in the town of ——, aforesaid, bounded and described as follows: [*insert description*].

And being so seized and possessed, as aforesaid, the said T. B. died on or about the —— day of ——, 18—.

And the said plaintiffs further show that the said T. B. in his lifetime, to wit: on or about the —— day of ——, 18—, made and published his last will and testament, in due form of law, and duly authenticated to pass

The petition of A. B., of, *&c.*, respectfully shows, that your petitioner and J. K., of, *&c.*, and C. D., of, *&c.*, a minor under the age of twenty-one years, and R. D., of Chicago, in the State of Illinois, and

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real estate; a copy of which, together with a codicil thereto, is hereto annexed, and marked "Schedule A."

And the said plaintiffs further show that the said testator in and by his said last will and testament, did, among other things, give, devise and bequeath to the children of his daughters L. A. H., wife of S. H., and M. N., wife of J. N., the said above-described premises, to be equally divided between said children as they respectively arrived at the age of twenty-one years.

And the said plaintiffs further show that at the time of the making of said last will and testament, and at the time of said testator's death, the said L. A. H., wife of S. H., and daughter of the said testator, had three children, to wit: L. B. H., now L. B. B., wife of E. B., M. H. and L. A. H., now L. A. P., wife of W. E. P. That the said M. N., wife of J. N., and daughter of the said testator, had three children, to wit: A. M. D., wife of C. B. D., one of said plaintiffs, and T. N., and J. H. N.

And the said plaintiffs further show that the said L. B. B. and E. B. her husband, on or about the —— day of ——, 18—, by their certain deed, or instrument in writing, executed and acknowledged in due form of law to pass real estate, did remise, release and quit-claim unto H. L. D., of ——, all their right, title and interest in and to the aforesaid premises; and that the said H. L. D. and C. his wife, on or about the —— day of ——, 18—, by their certain deed or instrument in writing, executed and acknowledged in due form of law to pass real estate, did remise, release and quit-claim unto the said plaintiff, C. B. D, all their right, title and interest of, in and to the aforesaid premises; as by reference to the said deeds and writings when produced, will more fully appear.

And the said plaintiffs aver, that the said plaintiffs and the said defendants, W. E. P. and L. A. P., his wife, M. H., T. N. and J. H. N., are seized in fee simple, and entitled to the aforesaid farms, pieces or parcels of land, as tenants in common; and that their rights and interests therein are as follows: The said plaintiff, C. B. D. as grantee of the said H. L. D., is seized and entitled to an undivided one-sixth part thereof; that the said plaintiff, A. M. D., as one of the children of said M. N., is also seized of and entitled to an undivided one-sixth part thereof; that the said defendant, M. H., as one of the children of said L. A. H., is seized of and entitled to an undivided one-sixth part thereof; that the said defendants, W. E. P. and L. A. P., his wife, in right of the said L. A. P. as one of the children of the said L. A. H., are seized of and entitled to, an undivided one-sixth part thereof; and that the said T. N. and J. H. N., are also each seized of and entitled to an undivided one-sixth part thereof.

The said plaintiffs further show that the above described premises and lands are the only real estate owned in common by the parties to this action, or by the said plaintiffs and the said defendants, M. H., W. E. P. and L. A. P., his wife, T. N. and J. H. N.

And the plaintiffs further show that there are no specific liens or incumbrances upon the said lands and premises, against any of the parties to this action, to the knowledge or belief of the said plaintiffs.

The said plaintiffs therefore pray the aid of this court in the premises, and that the part or shares belonging to the said plaintiffs and the other

some other person or persons, to your petitioner unknown, are seized in fee as tenants in common, of the following pieces or parcels of land, with the appurtenances, situate, lying, and being in —— aforesaid, and bounded and described as follows: [*describe the premises particularly.*]

And your petitioner further shows, that your petitioner is the owner of one undivided fifth part of the said premises, and obtained his title thereto by purchase from E. D., of, *&c.*

That the said J. K. is also the owner of an undivided fifth part of said premises, and obtained title thereto by purchase from H. D., of, *&c.*

That the said R. D. and C. D. are also each entitled to one undivided fifth part of said premises, and obtained title to the same by devise from their father, W. D., late of *&c.*, now deceased.

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parties aforesaid, of, in and to the aforesaid pieces or parcels of land may be ascertained and determined by and under the direction of this court. And that a partition and division thereof may be made between the said plaintiffs and the other parties interested in the said premises, according to the respective rights and interests of each therein.

And that a commission of partition may be issued out of and under the seal of this court, and proper commissioners may be appointed for the purpose of making partition of said premises; or, in case a partition thereof, or any part thereof, cannot be made without great prejudice to the owners, that then the same, or such part thereof as cannot be divided, may be sold by and under the direction of this court, and that the proceeds of the sale, after paying the costs and charges of this action, may be divided among the owners thereof, according to their several rights and interests therein; and to that end, that the rights and interests of the parties interested in the said premises, or in the proceeds of the sale thereof, may be ascertained and declared by the judgment of this court.

H. N., Plaintiffs' Attorney.

"*Schedule A*," *referred to in the annexed complaint.*

[*Insert Copy of Will.*]

III. *Notice of Object of Suit.*

[*Title as in last form.*]

To the above-named defendants: Take notice: That this action is commenced for the purpose of obtaining a partition and division among the owners thereof, of certain real estate and premises, situated in the town of ——, in the county of ——, in which the above-named defendants have or claim some interest.

Also take notice that the said plaintiffs make no personal claim against you in this action.

The following is a description of the premises above mentioned. [*Insert brief description.*] Dated, *&c.* Yours, &c.,

H. N., Attorney for Plaintiffs.

That one G. H. was formerly the owner of the remaining undivided fifth part of said premises, which he obtained by purchase from G. D., of, *&c.*, and that the said G. H. died on the —— day of ——, 18—, at ——, as deponent is informed and believes. But whether the said G. H. had sold his interest in the said premises, or left any will disposing of the same, or any heirs at law who would inherit the same, your petitioner has been unable to ascertain, although he has made diligent inquiry for that purpose.

Your petitioner further shows, that the several pieces or parcels of land above described, comprise the only real estate, within this State, owned in common by your petitioner and the parties aforesaid.

And your petitioner further shows, that he and the said J. K. and R. D., are all of full age. That the said C. D. is a minor under the age of twenty-one years, and that N. O., of, *&c.*, is the special guardian appointed by the court for the purpose of taking charge of the interests of the said minor in the proceedings instituted by your petitioner for the partition or sale of said premises.

And your petitioner further shows, that there are no specific liens or incumbrances upon the several pieces of land above described, or any of them, against any of the owners thereof, to the knowledge or belief of your petitioner. [*Or*, that the one equal undivided fifth part of said several pieces of land is incumbered by mortgage, executed by the said H. D. to S. T., of, *&c.*, previous to the sale thereof to the said J. K., which mortgage was dated the —— day of ——, 18—, and was given to secure to the said S. T., his heirs and assigns, the sum of one thousand dollars, in five years from the date thereof, with interest annually; and the same is still owned by the said S. T., as your petitioner is informed and believes.]

And your petitioner further shows, that he is desirous of having a partition or sale of the above mentioned premises, made under the direction and with the sanction of this court.

Your petitioner therefore prays, that a partition and division of the several pieces or parcels of land, above described, may be made by and under the direction of this court, between your petitioner and the said J. K. and R. D. and C. D., and the person or persons unknown, as aforesaid, according to their respective rights and interests therein; and that commissioners may be appointed by the court for the purpose of making such partition. Or, in case a partition of said premises, or of any part thereof, cannot be made without great prejudice to the owners, then that the said premises, or such part thereof as cannot be divided

may be sold by and under the direction of this court, and that the proceeds of the sale, after paying the costs and expenses of this suit, may be divided among the owners thereof according to their respective rights and interests therein. And that your petitioner may have such other or further relief as may be just. A. B.

L. P. C., Attorney.

[*Add jurat as in No.* 96.]

No. 203.

Notice of Presentation of Petition.

See ante, pp. 321, 331.

[*Title, as in No.* 202].

To J. K., R. D., and N. O., guardian of C. D., a minor, and to all persons unknown, having or claiming any interest in the premises described in the copy of petition hereto annexed.

Take notice, that a petition, with a copy of which you are herewith served, will be presented to the Supreme Court (*or other court*) at the next special term thereof, to be held at the Court House in ——, in the county of ——, on the —— day of —— next [*or*, instant], at the opening of the court on that day, or as soon thereafter as counsel can be heard; and that an application will be thereupon made to the said court, that the prayer of the said petition be granted.

Yours, &c., L. P. C.,

Atty. for Petitioner.

No. 208.

Order to Plead.

See ante, p. 333.

[*Title, as in No.* 202.] At, *&c.* [*as in No.* 6.]

On reading and filing the petition of A. B., dated the —— day of ——, 18—, praying for a division and partition of certain premises described therein, between J. K., R. D. and C. D., and parties interested in said premises, who are unknown to the said A. B., together with the notice annexed to said petition; and on reading and filing due proof of the service of the said petition and notice, and due publication thereof, according to law,—it is, on motion of L. P. C., attorney for the said A. B., ordered that the said J. K., R. D., C. D. and the person or persons interested in the said premises, who are not known, appear and show title to the proportions which they may claim of the premises described in said petition, and that they answer the said petition within twenty days from the service of this rule, if

served personally, or within forty days, if served by mail, or judgment, &c.

And it is further ordered, that a copy of this rule be served upon the proper parties, who are known, or their attorneys, personally or by depositing the same in the post-office, properly enclosed and addressed to the person served, at his place of residence, and paying the postage thereon; and that all other notices in any subsequent proceedings, be served in like manner.

Notice of the Above Order, to be Endorsed thereon.

SIR: Take notice of an order of the Supreme Court [*or other court*], of which the within is a copy. Dated, *&c.*,

Yours, &c., L. P. C., Atty. for Plaintiff.

No. 209.

Order for Judgment on Default. (*a*)

See ante, p. 333.

[*Title, as in No.* 202.] At, *&c.*, [*as in No.* 6.]

The default of the defendants for not appearing and showing title to the proportions which they may claim of the premises set forth in

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(*a*) The following form may be used in actions for partition, where one or more of the parties have answered, and an issue has been joined:

[*Title, as in note to No.* 202, *ante.*]

This action, being at issue upon the answer to the complaint, of the guardian ad litem of the infant defendants, all the other defendants having failed to answer the complaint, was brought to trial on the —— day of ——, 18—, before the Hon. ——, Justice of the Supreme Court [*or*, county judge of the county of ——, *or, as the case may be*], and a trial by jury having been waived by the oral consent of parties, in open court, and entered in the minutes of the court, and the decision of the said court having been given in writing, and filed with the clerk of this court, whereby it is found that the said plaintiffs, C. B. D., and A. M. D., and the said defendants, T. N., J. H. N., M. H. and L. A. P., are each severally seized in fee, as tenants in common, and each entitled in fee, to an equal undivided one-sixth part of the premises described in the complaint in this action;

Now, on motion of H. N., attorney for the said plaintiffs, it is hereby ordered and adjudged, that the rights and interests of the parties to this action are as follows:

The said plaintiff C. B. D., as the grantee of L. H., one of the devisees in said complaint named, is seized of and entitled in fee to, an equal undivided sixth part of the premises described in the complaint in this action. That the said A. M. D., is, *&c.* [*set out the interests of all the parties*].

And it is further ordered and adjudged that partition be made of the lands and premises mentioned and set forth in the complaint in this action; which said lands and premises are described as follows: [*insert description.*]

And it is further ordered and adjudged, that B. F., E. S. and W. W.,

the petition of A. B., the plaintiff in this cause, and for not answering the said petition, having been duly entered, and the said plaintiff having exhibited to the court (*a*), proof of his title, and an abstract of the conveyances by which the same is held; which proof and abstract have been duly filed with the clerk of this court; and the court having ascertained from the proof so taken, the rights, titles, and interests of the parties herein;

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three reputable freeholders of the county of ——, be, and they are hereby, appointed commissioners for the purpose of making such partition.

And it is further ordered, that the said commissioners, before proceeding with the execution of their duties as such commissioners, be severally sworn or affirmed before some officer authorized by law to administer oaths, honestly and impartially to execute the trust reposed in them, and to make partition, as directed by this court; and that such oath or affirmation, be filed with the clerk of this court, at or before the time the said commissioners shall make report of their proceedings as required by law.

And that the said commissioners shall divide the said lands and premises into six equal parts, quantity and quality relatively considered, and that they allot to the plaintiff, C. B. D., one of the said equal sixth parts of said premises; to the said A. M. D., *&c.* [*proceed the same as to the rights of the other parties*], to be held and enjoyed by the said parties in severalty, according to their rights and interests therein so ascertained, determined, and declared as aforesaid.

And that the said commissioners shall designate the parts or portions so allotted to each of the said parties, and the boundaries thereof, by sufficient description and monuments.

And it is further ordered that the said commissioners make a full and ample report to this court of their proceedings in this behalf, under their hands, or under the hands of any two of them, specifying therein the manner in which they shall have executed this judgment, and describing the lands divided and the parts or shares allotted to each party, with the quantity, courses and distances of each share and description of the parts, stones, or other monuments thereof, and the items of their charges and expenses.

And all the parties to this action are hereby required to produce to, and leave with, the said commissioners, for such time as the commissioners shall deem reasonable, all deeds, writings, surveys, or maps, relating to the said premises or any part thereof.

[*Add clause as to compensation for equality of partition, the same as in No.* 249, *post*].

And it is further ordered and adjudged that any of the parties to this action be at liberty to apply to the court on the foot of this judgment, for further direction.

[For form of Commissioners' Report under the above order, see note to No. 245; and for other forms, see note to No. 202].

(*a*) Such proof may also be taken by a reference for that purpose, to the clerk or other suitable person. *See ante, p.* 334. And the forms on the reference may be easily drawn from Nos. 239 and 240.

Now, on motion of L. P. C., attorney for the plaintiff, it is ordered and declared by the court, that the rights, titles and interests of said parties, so far as the same have appeared, are as follows, to wit: [*state the rights and interests of the parties respectively, and the shares to which they are entitled, according to the facts.*]

And it is hereby further ordered and adjudged, that partition be made between the said parties, according to the rights and interests of the parties, respectively, as above declared.

And it is further ordered, that W. M., J. F., and R. T., three reputable freeholders, be and they are hereby appointed commissioners, to make the partition so adjudged, according to the respective rights and interests of the parties, as the same are herein ascertained and determined by the court.

And it is further ordered that one fifth of the said premises remain undivided for the owners, aforesaid, whose interests are unknown and not ascertained.

No. 210.

Petition by a Person not named as a Party, for leave to appear and answer.

See ante, p. 335.

To the Supreme Court of the State of New York [*or other court; or*, To Hon. C. L. A., Justice of the Supreme Court; *or*, To Hon. A. D. W., county judge of the county of ——].

The petition of A. N., of, *&c.*, respectfully shows:

That your petitioner has an interest [*or*, a claim by which he may become interested at some future time], in the premises described in a certain petition for a division and partition thereof presented to the Supreme Court [*or other court*], by A. B., of, *&c.* That the said interest [*or*, claim] of your petitioner in the said premises, is, [*here state the interest or claim particularly, and then proceed:*]

And your petitioner further shows that he is not named as a party in the said petition; and he therefore prays that he may be permitted to appear and answer the said petition as a defendant therein. Dated, *&c.*

A. N.

M. F., Attorney.

County of —— ss. A. N., the above-named petitioner, being duly sworn, deposes and says, that the matters set forth in the above petition signed by deponent are true.

Sworn, *&c.*

A. N.

No. 211.

Order Permitting Petitioner to Appear and Answer.

See ante, p. 335.

[*Title as in No.* 202.] At, *&c.*, [*as in No.* 6.]

On reading and filing the petition of A. N., dated the —— day of ——, 18—, stating that he has an interest [*or*, claim] in the premises described in the petition in this cause, and that he is not named as a party in said petition; and on reading and filing the affidavit of the said A. N., of his interest [*or*, claim], as aforesaid. It is, on motion of M. F., attorney for the said A. N., ordered, that the said A. N. be, and he is hereby, admitted to appear and answer the said petition as a defendant.

No. 215.

Order of Reference as to Title, and Referee's Report.

See post, Nos. 224, 226; ante, p. 334.

No. 217.

Order that Shares may be Set Off to Parties in Common.

See ante, p. 340.

[*The order will be in the usual form as to the shares of the parties desiring a partition; and then say:*] And it appearing to the court that J. K. and R. D., two of the persons interested in the said premises, are desirous of enjoying their several shares or interests in common with each other, and that the same can be set off to them without prejudice to the interest of the parties, it is ordered that the said commissioners make the partition aforesaid in such manner that the shares of the said J. K. and R. D., consisting of two undivided fifth parts of said premises, remain without partition, to be enjoyed by the said J. K. and R. D. in common.

No. 218.

Oath of Commissioners.

See ante, p. 341.

[*Title as in No.* 202.]

We, W. M., J. F. and R. T., commissioners appointed by the Supreme Court [*or other court*] to make partition of the premises described in the petition in the above cause, being duly sworn, do make oath, and each for himself makes oath and says, that he will

honestly and impartially execute the trust reposed in him as such commissioner, and will make partition as directed by the court.

W. M.
Subscribed and sworn, *&c.* J. F.
R. T.

No. 219.

Report of Partition by Commissioners. (*a*)

See ante, p. 345.

[*Title as in No.* 202.]

To the Supreme Court of the State of New York [*or other court.*]:

In pursuance of, and in obedience to an order of this court, made in the above cause, dated the —— day of ——, 18—, the undersigned, commissioners in partition, do hereby respectfully report and return:

That having been first duly sworn, and having severally taken the oath that we would honestly and impartially execute the trust reposed in us, and make partition as directed by the court, we have carefully examined the premises described in the petition in this cause, and caused the said premises to be surveyed, and have made partition thereof, between the said parties, according to their respective rights and interests therein, as the same have been ascertained, determined, and declared by the court, as follows, viz:

We have divided the whole of said premises into five equal parts, quality and quantity relatively considered, which are designated on the map hereto annexed, by the letters, A, B, C, D, and E. And the division thus made, in our judgment is the most beneficial one, under all the circumstances, that could be made of such premises.

We further report, that we have set off in severalty to the plaintiff, A. B., all that certain piece or parcel of said premises designated on the said map by the letter A, and which is bounded and described as follows: [*insert description, containing the quantity, courses, and distances, and a description of the posts, stones, or other monuments thereof.*]

We have also, set off in severalty to the defendant J. K., all that certain piece or parcel of said premises, designated on the said map, by the letter B, and which is bounded and described as follows: [*insert description as to quantity, courses, and distance, &c., same as above.*]

We have also set off, &c. [*continue with respect to the other shares, the same as before.*]

(*a*) For report in an action for partition, see note to No. 245, *post.*

We further report, that we have set off all that certain piece or parcel of said premis s, being the one fifth part thereof, designated on the said map by the letter E, to remain undivided, for the owner or owners whose interests are unknown, and not yet ascertained; which piece or parcel of land, last aforesaid, is bounded and described as follows: [*insert description, quantity, &c., as above.*]

And we further certify and report, that the items of the expenses and charges, attending the said partition, including our fees as commissioners, are as follows:

Three days' services for each of the commissioners, at $2 per day for each	$18 00
Cash paid W. S., for one day's service, as surveyor, .	2 50
Cash paid for two chain and flag bearers, $1,00 each,	2 00
	$22 50

In witness whereof, we, the said commissioners, have hereunto set our hands, this —— day ——, A. D. 18—.

[*Signatures of Commissioners.*]

[*Add acknowledgment in usual form.*]

No. 220.

Notice of Motion to Confirm Report, and for Judgment, &c.

See ante, p. 346.

[*Title as in No.* 202.] Sir: Take notice, that I shall move this court at the next term thereof, to be held at the Court House in ——, in the county of ——, on the —— day of —— next [*or*, instant], or as soon thereafter as counsel can be heard, for an order confirming the report of the commissioners appointed to make partition in this cause, and for judgment thereon; and for such other or further order as may be just; which motion will be founded upon the said report, a copy of which is herewith served. L. P. C., Att'y for Pl'ff.

Dated, *&c.*

No. 222.

Judgment upon the Report.

See ante, p. 346.

At, *&c.* [*as in No.* 6.]

[*Title as in No.* 202.] This cause coming on to be heard, upon the report of W. M., J. F., and R. T., commissioners appointed therein,

by an order of this court dated the —— day of ——, 18—; and on reading and filing said report, which is dated the —— day of ——, 18—, by which it appears that the said commissioners have made partition of the premises described in the petition in this cause, between the parties herein, according to their respective rights and interests therein, as the same have been ascertained, determined, and declared by the court; and by which partition the said commissioners have divided the whole of said premises into five equal parts, which are designated on the map annexed to said report by the letters A, B, C, D, and E, and have set off in severalty to the plaintiff, A. B., all that certain piece or parcel of said premises bounded, and described in said report, as follows: [*insert description*]. And also by which partition the said commissioners have set off in severalty to the said defendant J. K., *&c.* [*set out the share, &c., the same as in report; and so on with the other shares*].

And on reading and filing a notice of motion for the confirmation of said report, and for judgment thereon, with due proof of the service of such notice upon the attorney for the defendants;

It is, on motion of L. P. C., attorney for the plaintiff, no one appearing for the defendants, ordered and adjudged, and this court does hereby order and adjudge, that the said report, and all things therein contained, do stand ratified and confirmed; and that the partition, so made, be firm and effectual forever.

And it is further ordered and adjudged, that the defendants, J. K., R. D., C. D., and owners unknown, each pay to the plaintiff, or his attorney, the one-fifth part of the costs and charges of the proceedings in this cause; which costs and charges are adjusted, according to law, at the sum of —— dollars; and that the plaintiff have execution therefor. [*Or*, And it is further ordered and adjudged that each share of said premises be charged with one fifth of the aggregate amount of the costs of all the parties to this suit. And that the plaintiff recover his costs and disbursements herein, which are adjusted, according to law, at the sum of —— dollars. That the guardian, ad litem, of the defendant C. D., recover his costs and disbursements herein, which are adjusted, according to law, at the sum of —— dollars; and that the defendant J. K., who has appeared in this proceeding, recover his costs and disbursements, which are adjusted, according to law, at the sum of —— dollars.]

Another Judgment as to Costs.

See ante, p. 369, and note; 2 Barb. Ch. Pr. 738; 7 Paige, 204.

And it is further ordered and adjudged, that the costs and charges of the several parties in this suit to be taxed, shall be borne and paid by the plaintiffs and defendants as follows: The said G. T., the one-third part thereof; the said G. G. and L. G. C. each one-sixth part thereof; the said H. T. the one-sixth part of one-third thereof; and the said E. W. T., M. M. C., J. M. T., and S. M. T., each five seventy-second parts thereof; and that the parties entitled to such costs have execution according to the course and practice of the court; that is to say, that the parties whose several bills of costs and expenses as taxed exceed the amount of their respective portions of the costs, as aforesaid, have execution for such excess against the other parties respectively for the amount which the respective taxed bills of such other parties, are less than the amount of their respective portions of the whole costs of all the parties.

And it is further ordered, that the costs of the guardian ad litem of the infant defendants respectively, to the extent of their several shares or portions of the whole costs of the suit, are declared to be liens upon their respective shares of the premises in favor of such guardian ad litem, which costs the general guardians of the infants are authorized and directed to pay out of the rents and profits of such shares, or out of any other moneys which may come to their hands belonging to the said infants respectively. And that the guardian ad litem be at liberty to apply to the court for further directions, if necessary, as to the payment of such costs.

No. 223.

Return of Commissioners that Partition cannot be made.

See ante, p. 348.

[*Title as in No.* 202].

To the Supreme Court of the State of New York [*or other court*].

The undersigned, W. M., J. F., and R. T., commissioners appointed by an order of the Supreme Court [*or other court*], dated the —— day of ——, 18—, to make partition of the lands and premises described in the petition in the above cause, do hereby certify and return to the said court, that after our appointment as such commissioners, as aforesaid, we took and subscribed the oath directed by the statute in such case made and provided; and that we then proceeded to examine the

said premises for the purpose of making division and partition thereof, agreeably to the order of the court to that effect.

And we further certify and report, that the said premises are so circumstanced that an actual partition thereof cannot be made without great prejudice to the owners thereof, for the following reasons: [*state the reasons particularly*]. And we are therefore of opinion, that a sale of the whole of the said premises is necessary and expedient. Dated, *&c.* [*Signatures of Commissioners.*]

L. P. C., Attorney for Pl'ff.

No. 224.

Order for Creditors to be brought in, and of Reference as to Incumbrances.

See ante, p. 349.

At, *&c.* [*as in No.* 6.]

[*Title, as in No.* 202.] The commissioners appointed to make partition of the premises described in the petition in this cause, having reported to the court that such partition cannot be made without great prejudice to the owners of said premises, and that a sale thereof is necessary and expedient; and it appearing to the court that the creditors having specific liens on said premises, have not been made parties to the proceedings;

It is, on motion of L. P. C., attorney for the plaintiff, ordered that the plaintiff amend his petition by making a party to the proceedings every creditor having a specific lien on the undivided interest or estate of any of the parties to this suit, by mortgage, devise or otherwise.

And it is further ordered, that it be referred to L. F., Esq., of ——, to ascertain and report whether the shares or interests in the said premises, of the parties to this proceeding, or any of them, are subject to any general lien or incumbrance, by judgment or otherwise.

No. 225.

Advertisement by Referee as to Liens and Incumbrances.

See ante, p. 350.

[*Title, as in No.* 202.] The undersigned, duly appointed referee, by an order of this court made in the above cause, on the —— day of ——, 18—, hereby requires all persons having any general lien or incumbrance, by judgment or decree, or otherwise, on the undivided share or interest of any of the owners, in the premises hereinafter described, to produce to the undersigned, on or before the —— day of

—— next, at his office in the village of ——, in the county of ——, proof of their respective liens and incumbrances, together with satisfactory evidence of the amount due thereon; and to specify the nature of such incumbrances, and the dates thereof, respectively.

The premises are described in the petition in the above cause as follows: [*insert description*]. Dated, *&c.*

L. P. C., Attorney. L. F., Referee.

No. 226.

Referee's Report as to Incumbrances, &c.

See ante, p. 350.

[*Title, as in No.* 202.]

To the Supreme Court of the State of New York: [*or other court*].

In pursuance of an order of this court, dated the —— day of ——, 18—, by which it was referred to me to ascertain and report to the court, whether the shares or interests in the premises described in the petition in this cause, of the parties to this suit, or any of them, are subject to any general lien or incumbrance by judgment or otherwise, I, the said referee, do respectfully report:

That I caused a notice to be published, as required by law, for all persons having any general lien or incumbrance, by judgment or decree, on the undivided share or interest of any of the parties, to the premises described in said petition, to produce to me proof of their respective liens and incumbrances, together with satisfactory evidence of the amount due thereon; and to specify the nature of such incumbrances, and the dates thereof respectively.

And I further report that I have caused the necessary searches to be made; and I find that there is no general lien or incumbrance, by judgment or otherwise, on the undivided share or interest of any of the parties, in the premises aforesaid; [*or*, that the share of J. K., one of the defendants herein, is subject to a judgment recovered in this court against the said J. K., in favor of B. F., docketed on the —— day of ——, 18—, on which there appears to be due the sum of $—— and interest thereon from the said —— day of ——, 18—.]

And I further report that no creditor or person, having a general lien on any undivided share or interest in the premises, by judgment or decree, or otherwise, appeared before me on the said reference, to establish his claim, in pursuance of the notice published as aforesaid.

All which is respectfully submitted.

Dated, *&c.* L. F., Referee.

No. 227.

Order Directing a Sale of the Premises.

See ante, p. 348.

At, *&c.*, [*as in No.* 6.]

[*Title, as in No.* 202.] On reading and filing the report of W. M., J. F. and R. T., commissioners appointed to make partition of the lands and premises described in the petition in this cause, wherein the said commissioners report that the said premises are so circumstanced that an actual partition thereof cannot be made without great prejudice to the owners of said premises; and the court being satisfied that such report is just and correct;

It is, on motion of L. P. C., attorney for the plaintiff, ordered that the said commissioners sell the said premises, with the appurtenances, at public auction, to the highest bidder, after giving due notice of the time and place of such sale, according to law.

And it is further ordered that a credit of —— months [*or*, years], be given for one third [*or*, one half, *or such other portion as the court may direct*], of the purchase-money of said premises, to be secured at interest, by a mortgage on the premises sold, and also by a bond of the purchaser, conditioned for the payment of the said one third [*or*, one-half, *&c.*], of the said purchase-money, in —— months [*or*, years], from the date of said sale; and also by, *&c.* [*such other security as the court may direct*].

And it is further ordered that the said commissioners bring into court, and pay to the treasurer of the county of ——, the portion of the purchase-money arising from the sale of the estate or interest of J. K., one of said defendants, in the premises aforesaid, after deducting the portion of the costs, charges, and expenses to which it shall be liable. [*If portion of any other of the parties is incumbered, add a like order as to that.*]

No. 228.

Notice of Sale in Partition.

See ante, p. 353.

[*Title, as in No.* 202.]

In pursuance of an order of the Supreme Court [*or other court*], made in the above cause, dated the —— day of ——, 18—, the undersigned, commissioners in partition, will sell at public auction to the highest bidder, at the front steps of the Court House in the village of ——, on the —— day of ——, 18—, at 10 o'clock A. M., all that certain piece or parcel of land situated in the town of ——, in the

county of ——, and bounded and described as follows: [*insert description.*]

Dated, *&c*, [*Names of Commissioners.*]

No. 229.

Commissioners' Report of Sale.

See ante, p. 354.

[*Title, as in No.* 202.]

To the Supreme Court of the State of New York: [*or, other court.*]

The undersigned, W. M., J. F., and R. T., appointed commissioners in partition, and directed by an order of this court, dated the —— day of ——, 18—, to sell the premises described in said order, at public auction, to the highest bidder, do report:

That having caused a notice of the time and place of sale of the said premises, containing an accurate description thereof, to be published once in each week for six weeks immediately previous to such sale, in one of the public newspapers printed in the county of ——, where such premises are situated, and having also caused a copy of such notice to be put up at three public places in the town where the said premises were sold [*and if sold in a town different from that where situated, say:* and also, in the town where the said premises are situated], we did, on the —— day of ——, 18—, at 10 o'clock in the forenoon, that being the time specified in the said notice, attend at the front steps of the Court House, in the village of ——, the place therein mentioned, and exposed the said premises for sale, at public auction, to the highest bidder, as directed by the said order.

We do further report, that the said premises were sold together, and were struck off to S. P., of, *&c.*, for the sum of —— dollars, that sum being the highest sum bidden for the same, and the said S. P. being the highest bidder therefor; [*or*, that the said premises were put up, separately, and were each and every of them struck off to S. P., of, *&c.*, for the following sums:—lot No. 1, for the sum of —— dollars; lot No. 2, for the sum of —— dollars; and lot No. 3, for the sum of —— dollars, those sums being the highest sums bidden for the said lots respectively, and the said S. P. being the highest bidder therefor; which several sums amount in the whole to $——.]

And we further report that the terms and conditions of such sale were reduced to writing, and made known to the persons attending such sale, previous to putting up the said lots, and were as follows: [*state terms of sale.*]

We further report, that the said S. P. has signed the written conditions of sale above mentioned, together with an acknowledgment that he has purchased the premises upon those terms; and he has in all respects complied with the terms of sale above mentioned.

All which is respectfully submitted.

Dated, *&c.* [*Signatures of Commissioners.*]

County of ——, ss. On this —— day of ——, 18—, before me personally appeared W. M., J. F., and R. T, above named, and being severally sworn, each for himself deposes and says, that he has read the above report subscribed by him, and knows the contents thereof, and that the same is true, according to the best of his knowledge, information, and belief. I. A. M., Justice of the Peace.

No. 230.

Order confirming Sale.

See ante, p. 355.

[*Title, as in No.* 202.] At, *&c.* [*as in No.* 6].

On reading and filing the report of W. M., J. F. and R. T., commissioners appointed to make partition between the parties, of the lands and premises described in the petition in this cause, whereby it appears that, *&c.* [*insert their report in substance*].

Now, on motion of L. P. C, attorney for A. B., the plaintiff, it is ordered, that the said sale be and the same is hereby ratified, approved, and confirmed by the court; and that the said commissioners, or any two of them, execute a conveyance for the said premises to the said S. P., pursuant to such sale.

It is further ordered that the costs and expenses of the proceedings in this suit which are adjusted, according to law, at the sum of —— dollars, be deducted from the proceeds of the said sale so made by the said commissioners, and be by them paid to the said A. B., or his attorney; and that the said commissioners also pay to the said A. B., or bring into court for his use, the one-fifth part of the residue of the proceeds arising from said sale.

And it is further ordered that the said commissioners bring into court, and pay to the treasurer of the county of ——, the one-fifth part of the said residue of said proceeds, being the share arising from the sale of the interest of J. K., in said premises after deducting the portion of the costs and expenses to which such share is liable. [*If the portion of any other of the parties is incumbered, add a like order as to that*].

It is further ordered that the said commissioners bring into court for the use of C. D., an infant defendant in this suit, and pay to the said treasurer [*or*, that the said commissioners pay to the general guardian of C. D., an infant and one of the defendants herein, for the use of such infant], the one-fifth part of the said residue. And the said treasurer [*or*, general guardian] is hereby directed to invest the said moneys on bond and mortgage in the name of such infant [*or*, general guardian], upon unincumbered real estate of at least double the value of the moneys so invested.

And it is further ordered that the said commissioners bring into court, and pay to the treasurer of the county of ——, the one-fifth part of said residue, for the use of the owners unknown, mentioned in the petition in this cause. And the said treasurer is hereby directed to invest the said moneys in permanent securities at interest, for the benefit of such unknown owners. [*If any of the parties are absentees, without legal representatives in this State, add a like order as to their share.*]

No. 231.

Commissioners' Deed to Purchaser.

See ante, p. 355.

This indenture, made this —— day of ——, in the year of our Lord one thousand eight hundred and fifty ——, between W. M., J F., and R. T., all of, *&c.*, commissioners in partition, duly appointed as hereinafter mentioned, parties of the first part, and S. P., of, *&c.*, party of the second part: Whereas, A. B., of, *&c.*, did exhibit to the Supreme Court [*or other court*], a petition for a division and partition of certain premises therein mentioned, according to the respective rights of the parties interested therein, and for a sale of such premises, if it should appear that a partition thereof could not be made without great prejudice to the owners, pursuant to the statute relating to the partition of lands; in which petition is set forth the names of the parties so interested, and the nature and extent of their respective interests, as by reference to said petition on file with the clerk of said court at his office in the county of ——, will more fully appear. And whereas such proceedings were thereupon had, in the said court, that judgment was duly rendered that partition of the said premises should be made according to the several rights and interests of the said parties; and the parties of the first part were appointed commissioners to make such partition. And whereas, such proceedings were afterwards had, in the said

court, that the parties of the first part, as such commissioners, were, by an order of said court, directed to sell the said premises with the appurtenances, at public auction to the highest bidder, after giving due notice of the time and place of such sale, according to law, as by the records of said court, will more fully and at large appear. And whereas the said commissioners, puusuant to the said order and direction, after giving public notice of the time and place of such sale, did, on the —— day of ——, 18—, at the front steps of the Court House in the village of ——, in said county, expose to sale at public auction, all and singular the said premises, with the appurtenances; at which sale the said premises were sold to the party of the second part, for the sum of —— dollars, that being the highest sum bid for the same; and which premises are bounded and described as follows: [*insert description.*]

And whereas, the proceedings of the said commissioners were afterwards duly reported to the court; and the said sale was approved and confirmed on the —— day of ——, 18—, as by the records of said court, reference being thereunto had, will more fully appear. And the said commissioners were thereupon directed by the said court, to execute to the said party of the second part, a conveyance of said premises, pursuant to the sale so made as aforesaid.

Now, this indenture witnesseth, that the said parties of the first part, commissioners as aforesaid, in order to carry into effect the sale so made by them, as aforesaid, and also by virtue of the statute in such case made and provided, and in consideration of the sum of money so bid as aforesaid, to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, aliened, released, conveyed, and confirmed and by these presents do grant, bargain, sell, alien, release, convey and confirm, unto the said party of the second part, and to his heirs and assigns forever, all the estate, right, title, interest, claim, and demand, of the said parties of the first part, and also all the right, title, interest, claim and demand, of all and singular the several and respective parties to the aforesaid proceedings in partition, of, in, and to all and singular the said premises above particularly described; together with all and singular the rights, titles, privileges, hereditaments and appurtenances thereunto belonging, or in any wise appertaining. To have and to hold all and singular the said premises unto the said party of the second part, his heirs and assigns; to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

Signed, sealed, and delivered in presence of W. M. [L. S.]
J. F. [L. S.]
R. T. [L. S.]

[*To be acknowledged in the usual form.*]

No. 236.

Affidavit on Application to Court for Moneys.

See ante, p. 364.

[*Title as in No.* 202.] County of ——, ss. J. K., of, *&c.*, being duly sworn, deposes and says: That he is one of the defendants above-named; that this cause was commenced for the partition of real estate situated in the county of ——, which real estate was owned by the parties herein as tenants in common; that the share or interest of deponent in said real estate was the undivided one-fifth part thereof; that as deponent is informed and believes, such proceedings were had in said cause that the said real estate was sold by and under the order of this court, and the share or portion of the purchase-money belonging to deponent, after deducting the costs and charges to which it was liable, and which amounted to —— dollars, was ordered to be brought into court, and paid to the treasurer of said county; and the same is now in the possession of said treasurer, as deponent is also informed and believes.

And deponent further says, that the share or interest of deponent, in said premises as aforesaid, was incumbered at the time of said sale, by a judgment in favor of B. F., of, *&c.*, against deponent, and which judgment was docketed in the clerk's office of said county, on the —— day of ——, 18—, as by reference to the papers on file in this cause will more fully appear; that the said judgment is now owned by the said B. F., who resides at ——, aforesaid, and the true amount actually due thereon, is the sum of —— dollars, with interest thereon from the —— day of ——, 18—; that there are no other incumbrances chargeable upon the share of deponent, as aforesaid, as he verily believes. J. K.

Sworn, *&c.*

No. 237.

Notice of such Application, &c.

See ante, p. 364.

[*Title, as in No.* 202.]

To B. F., of, *&c.* Sir: Take notice, that I shall apply to this court,

at the next special term thereof to be held at the Court House, in the village of ——, on the —— day of —— next, or as soon thereafter as counsel can be heard, for an order, that the share or portion of moneys belonging to J. K., in the suit for partition of certain real estate situated in the county of ——, commenced by A. B., of, *&c.*, against the said J. K., and R. D., C. D., and owners unknown, and now deposited with the treasurer of said county, be paid to the said J. K., after deducting therefrom the amount actually due to you on the judgment mentioned in the affidavit, with a copy whereof you are herewith served.

Dated, *&c.* Yours, &c.

T. C., Attorney. J. K.

No. 238.

Affidavit of Service of Notice, &c.

See ante, p. 364.

[*Title, as in No.* 202.]

County of ——, ss.: M. N., of, *&c.*, being duly sworn, deposes and says: That on the —— day of ——, 18—, he served upon B. F., of, *&c.*, a notice of which the annexed notice marked "A." is a copy, by delivering such notice to the said B. F., personally, and leaving the same with him, at the village of ——, in said county.

[*If the service was by leaving at his residence*, then say: That on the —— day of ——, 18—, he served upon B. F., of, *&c.*, a copy of the notice hereto annexed, by leaving such copy at his residence in ——, in said county, in charge of the wife [*or*, daughter, aged eighteen years or thereabouts, *or other person of proper age*], of the said B. F.]

And deponent further says, that at the time and place of serving said notice, as aforesaid, he also served upon the said B. F., in like manner as aforesaid, a copy of the affidavit hereto annexed.

Sworn, *&c.* M. N.

No. 239.

Affidavit to obtain order of Reference under Rules 78 and 79 of the Supreme Court.

See ante, p 334, and p. 357, and note.

[*Title, as in No.* 202.] County of ——, ss. L. P. C., attorney for A. B., the above-named plaintiff, being duly sworn, says: That the petition in this cause was filed for the partition or sale of certain real estate situated in the town of ——, in said county. That none of the adult defendants have appeared in this cause, although more than

forty (*a*) days have elapsed since the service of the petition and notice upon the defendants. [*Or*, That all the adult defendants have appeared and put in answers, in which the rights and interests of the several parties, as stated in said petition are not denied or controverted.] That one of said defendants is an infant, residing at ——, in said county, who has put in the usual general answer by his guardian ad litem. [*Or*, That one of said defendants is a non-resident of this State, to wit, a resident of the State of Illinois. *Or*, That the person or persons interested in a portion of said premises are unknown; and are proceeded against as unknown owners.]

[*If a reference as to a sale is desired, then proceed as follows:*]

And deponent further says, that the whole premises of which partition is sought, are so circumstanced [*or*, that a portion of the premises of which partition is sought, to wit, the house and lot in the village of ——, which will exceed in value the share to which any of the tenants in common will be entitled, is so circumstanced] that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition *see* [*ante, p.* 243, *and note*], and to the ability of the respective parties to pay a reasonable compensation to produce such equality.

Sworn, *&c.* L. P. C.

No. 240.

Order of Reference, &c.

See ante, pp. 334, 357, note.

[*Title, as in No.* 202.] At, *&c.*, [*as in No.* 6.]

On reading and filing the affidavit of L. P. C., by which it appears that the petition in this cause was filed for the partition or sale of certain real estate situated in the town of ——, in the county of ——; and that none of the adult defendants have appeared in this cause, although more than forty days have elapsed since the service of the petition and notice upon the defendants. [*Or*, that all the adult defendants have appeared and put in answers, in which the rights and interests of the several parties as stated in said petition are not denied or controverted,] and that one of said defendants is an infant, who has put in the usual general answer by his guardian ad litem. [*Or*, that one of said defendants, is a non-resident of this State, to wit: a resi-

(*a*) In *actions* for partition, judgment by default may be taken at the expiration of twenty days from the service of the summons. *Code of Pro.* § 246.

dent of the State of Illinois: *Or*, that the person or persons interested in a portion of said premises are unknown; and are proceeded against as unknown owners.]

It is, on motion of L. P. C., attorney for the plaintiff, ordered, that it be referred to L. F., Esq., of the village of ——, as a referee, to take proof of the plaintiff's title and interest in the premises described in said petition, and of the several matters set forth in the said petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.

And it is further ordered, that the said referee inquire whether a partition of said premises can be made in such manner as to set off to two or more of the parties to the suit, their shares in the premises, to remain undivided, and to be enjoyed by them in common.

[*If a reference, as to a sale, is desired, then proceed:*]

And it is further ordered, that the said referee also inquire and report whether the whole premises, or any lot or separate parcel thereof, is so circumstanced that an actual partition cannot be made. And if the said referee arrives at the conclusion that the sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, it is further ordered that he specify the same in his report, together with the reasons which render a sale necessary; and in such a case, that he also ascertain and report whether any creditor not a party to the suit, has a specific lien, by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if the said referee finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to a general lien or incumbrance, by judgment or decree.

And it is further ordered, that the said referee also ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein by judgment or decree, and who shall appear and establish his claim on such reference.

And it is further ordered, that the said referee, if requested by the parties who appear before him on such reference, ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or inter-

ests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser.

No. 241.

Report of Referee where a Partition only is sought.

See ante, p. 334.

[*Title, as in No.* 202.]

To the Supreme Court of the State of New York :

In pursuance of an order of this court, made in the above cause on the —— day of ——, 18—, by which it was referred to me to take proof of the plaintiff's title and interest in and to the premises described in the plaintiff's petition, and of the several matters set forth in the said petition ; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held,—I, the subscriber, referee, aforesaid, do report :

That (*) having been attended by the attorneys for the several parties who appeared in the cause, I proceeded to a hearing of the matters so referred.

I further report that on such hearing I took proof of the several matters set forth in said petition, and find that the material facts therein alleged are true.

And I further report that the following is an abstract of the conveyances by which the premises described in said petition, are held, that is to say :

E. D. to A. B. } Quit-claim deed conveying the equal undivided one-fifth part of said premises. Deed dated the —— day of ——, 18—; duly acknowledged, the —— day of ——, 18—; consideration —— dollars. Recorded in the clerk's office of —— county, on the —— day of ——, 18—, at — M. [*And so on, giving an abstract of the conveyances of the several undivided shares or interests of the parties, back to the time they were united in one common source.*]

And I further report, that the rights and interests of the parties in the premises, are as follows, viz. :

A. B., the plaintiff, as grantee of E. D., is entitled to one undivided fifth part thereof.

The defendants R. D. and C. D. are each entitled to one undivided fifth thereof, as the devisees of W. D., late of, *&c.*, deceased.

The defendant J. K. is also entitled to one undivided fifth part of said premises, as grantee of H. D.

The remaining undivided fifth part of said premises was formerly owned by one G. H., who derived title thereto by purchase from G. D. But the said G. H. died on or about the —— day of ——, 18—, and the share of said G. H. is now owned by some person or persons unknown. [§]

And I further report that J. K. and C. D., two of said defendants, are desirous of enjoying their several shares in common with each other, and that a partition of said premises can be made in such manner as to set off to the said J. K. and C. D., the two undivided fifth parts of said premises, to be enjoyed by them in common, without prejudice to the interests of the parties, or any of them.

All which is respectfully submitted.

Dated, *&c.* L. F., Referee.

No. 242.

Report of Referee that Partition can be made.

See ante, pp. 357, 358.

[*Title as in No.* 202.]

To the Supreme Court of the State of New York:

In pursuance of an order of this court, made in the above cause, on the —— of ——, 18—, by which it was referred to me to take proof of the plaintiff's title and interest in and to the premises described in the plaintiff's petition, and of the several matters set forth in the said petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held; and also to inquire and report whether the said premises, or any lot or separate parcel thereof, is so circumstanced that an actual partition thereof cannot be made; I, the subscriber, referee aforesaid, do report:

That, *&c.* [*follow the last form from the* (*) *to the* [§], *and then proceed as follows:*]

I further report, that in the opinion of the undersigned, the premises described in said petition, are so circumstanced that a partition thereof can be made without prejudice to the owners thereof, and that a partition of such premises would be more advantageous to such owners than a sale thereof.

All which is respectfully submitted.

Dated, *&c.* L. F., Referee.

No. 243.

Notice of Motion to Confirm Report.

[*Same substantially as in No.* 220.]

No. 244.

Order for Partition, and Appointing Commissioners.

See ante, p. 155.

At, *&c.* [*as in No.* 6].

[*Title, as in No.* 202.] The referee appointed in this cause having made his report, dated the —— day of ——, whereby it appears that the premises described in the petition of A. B., the plaintiff, are so circumstanced, that a partition thereof can be made without prejudice to the owners thereof; and that such partition would be more advantageous to the owners of said premises than a sale thereof; and whereby it also appears that the plaintiff, as grantee of E. D., is entitled to one undivided fifth part of said premises; and the other parties to this suit to the several rights and interests set forth in said report.

Now, on reading and filing the said report and notice of motion, and proof of due service of the same upon the defendants herein, who have appeared, and on motion of L. P. C., attorney for the plaintiff, A. B., no one appearing for the defendants, it is ordered and adjudged, and this court does hereby order and adjudge, that the report of the said referee be, and the same is hereby, approved and confirmed.

It is further ordered, that the rights, titles, and interests of the several parties to this suit, so far as the same have appeared, are as follows: [*state the rights and interests of the parties respectively, and the shares to which they are entitled, according to the facts.*]

And it is hereby further ordered and adjudged, that partition be made between the said parties according to the rights and interests of the parties respectively, as above declared.

It is further ordered, that W. M., J. F., and R. T., three reputable freeholders, be and they are hereby appointed commissioners, to make the partition so adjudged, according to the respective rights and interests of the parties, as the same are herein ascertained and determined by the court.

And it is further ordered, that one fifth of the said premises remain undivided for the owners aforesaid, whose interests are unknown, and not ascertained.

And it is further ordered and adjudged, that in case partition of such premises cannot be made with perfect equality between the said

parties, according to their respective rights and interests therein, unless compensation be made by one or more of the said parties to the other of them for equality of partition, that then, and in that case, the said commissioners ascertain and report the proper compensation which ought to be made for equality of partition; and by which of the parties the same should be paid, and to which the same ought to be allowed.

But the said commissioners shall not report compensation to be paid by an infant for equality of partition, unless it satisfactorily appears to them that such infant has sufficient personal estate to pay the same, and his portion of the costs and expenses of the proceedings, and all other liens on his share of the premises—except where from the situation of the property, and of the interests of the parties, it cannot be charged upon the share of an adult.

And it is further ordered, that all the parties herein shall produce to, and leave with, the said commissioners, for such time as the said commissioners shall deem reasonable, all deeds, writings, surveys or maps, relating to the said premises or any part thereof.

No. 245. (*a*)

Report of Commissioners.

[*Same substantially as in No.* 219; *and see ante, p.* 345.]

No. 246.

Report where compensation for equality of partition has been awarded.

See ante, p. 343, and note.

And we further certify and report, that in making the said partition as the same could not otherwise be made equal between the said parties without prejudice to their rights and interests, we have, for the purpose of equalizing the same, ascertained the compensation and sums to be made and paid the parties respectively to whom compensation ought to be made in regard to the difference of the value of the several parts or allotments into which the said premises were so divided as aforesaid for equality of partition according to the nature and equity of the case, and did allot, direct and award the same to be paid as follows, that is to say: we did ascertain the compensation which ought to be made by T. N., the party to whom the said allotment, division No. 2, of the said premises was so allotted as aforesaid

(*a*) In respect to forms in actions, see note to No. 202, *ante*.

for equality of partition in the premises, to be the sum of —— dollars; and we do allot and award the said sum of —— dollars to be paid by the said T. N., to the said M. H., to whom the said allotment division No. 6, of the said premises was allotted as aforesaid in full of the compensation to be made in the premises to that share of the said premises.

No. 247.

Notice of motion to confirm Report, &c.

[*Same as in No.* 220; *and see ante, p.* 346.]

No. 248.

Order of Judgment upon the Report.

[*Same substantially as in No.* 222; *and see ante, p.* 346.]

No. 249.

Order directing Compensation for equality of Partition.

See ante, p. 343, and note.

And it is further ordered and adjudged, that the said compensation of —— dollars, by the said commissioners ascertained, allotted and awarded to be made by the said T. N. to whom the said part or allotment divison No. 2, of the said premises was allotted and ascertained as aforesaid, be paid by the said T. N. to the said M. H., to whom the said allotment or division No. 6 was allotted and assigned as aforesaid, in full of the compensation to be made to her in the premises aforesaid; the amount of which compensation is hereby declared to be a lien upon said division No. 2; and that the said M. H. have execution therefor.

No. 250.

Report of Referee, that a Sale is necessary.

See ante, p. 357, and note.

[*Title, as in No.* 202.]

To the Supreme Court of the State of New York:

In pursuance of an order of this court, made in the above cause, on the —— day of ——, 18—, by which it was referred to me to take proof of the plaintiff's title and interest in and to the premises described in the plaintiff's petition, and of the several matters set forth in the said petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held; and also to inquire and report whether the said premises, or any lot or separate parcel thereof, is so circumstanced that an actual partition thereof cannot be made; and if the said referee

arrived at the conclusion that the sale of the whole premises, or of any lot or separate parcel thereof will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and in such a case, that he also ascertain and report whether any creditor not a party to the suit, has a specific lien, by mortgage, devise or otherwise, upon the undivided share or interest of any of the parties in that portion of the premises which it is necessary to sell; and if the said referee finds that there is no such specific lien, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to a general lien or incumbrance, by judgment or decree; and that he also ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein by judgment or decree, and who shall appear before said referee, and establish his claim; and also that he ascertain and report, if requested to do so by the parties who appear before him, the amount due to any creditor not a party to the suit, which is either a general or specific lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon in the hands of the purchaser:

I, the subscriber, referee, as aforesaid, do respectfully report:

That I caused a notice to be published as required by law, for all persons having any general lien or incumbrance, by judgment or decree, on the undivided share or interest of any of the parties to the premises described in said petition, to produce to me proof of their respective liens and incumbrances, together with satisfactory evidence of the amount due thereon; and to specify the nature of such incumbrances, and the dates thereof, respectively.

That afterwards, having been attended by the attorneys for the several parties who appeared in the cause, I proceeded to a hearing of the matters so referred.

I further report that on such hearing I took proof of the several matters set forth in said petition, and find that the material facts therein alleged are true.

And I further report, that the following is an abstract of the conveyances by which the premises described in said petition, are held, that is to say:

E. D. to A. B.	Quit-claim deed conveying the equal undivided

one-fifth part of said premises. Deed dated the —— day of ——, 18—, duly acknowledged the —— day of ——, 18—, consideration, —— dollars. Recorded in the clerk's office of —— county, on the —— day of ——, 18—, at —— o'clock —. M. [*And so on, giving an abstract of the conveyances of the several undivided shares or interests of the parties, back to the time they were united in one common source.*]

And I further report that the rights and interests of the parties in the premises, are as follows, viz:

A. B., the plaintiff, as grantee of E. D., is entitled to one undivided fifth part thereof.

The defendants R. D. and C. D., are each entitled to one undivided fifth thereof, as the devisees of W. D., late of, *&c.*, deceased.

The defendant, J. K., is also entitled to one undivided fifth part of said premises, as grantee of H. D.

The remaining undivided fifth part of said premises, was formerly owned by one G. H., who derived title thereto by purchase from G. D. But the said G. H. died on or about the —— day of ——, 18—, and the share of said G. H., is now owned by some person or persons unknown.

And I further report that the premises described in said petition are so circumstanced, that an actual partition thereof, cannot be made without great prejudice to the owners thereof, and for the following reasons: [*state the reasons*]. I am of opinion, therefore, that a sale of the whole of said premises is necessary and expedient.

I further report that I have caused the necessary searches to be made, and I find that no creditor not a party to the suit, has any specific lien by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties in the premises [*or*, that I have caused the necessary searches to be made, and I find that the undivided one-fifth part of said premises owned by J. K., aforesaid, is incumbered by mortgage, executed by H. D. aforesaid, to S. T., of, *&c.*, previous to the sale thereof to said J. K., as aforesaid, which mortgage was dated the —— day of ——, 18—, and was given to secure to the said S. T., his heirs and assigns, the sum of one thousand dollars, in five years from the date thereof, with interest, annually; and that the said sum of one thousand dollars, with interest thereon from the —— day of —— 18—, is now unpaid on said mortgage; and that the said S. T., who is not a party to this suit, is still the owner and holder of said mortgage].

That there is no general lien or incumbrance by judgment or decree upon the undivided share or interest of any of the parties in the premises.

And I further report that no creditor, not a party to this suit, having a general lien on any undivided share or interest in the premises, by judgment or decree, or otherwise, appeared before me on the said reference to establish his claim, in pursuance of the notice published by me, as aforesaid.

I further report that the sum of five hundred dollars, with interest thereon from the —— day of ——, 18—, is due to R. S., of, *&c.*, who is not a party to this suit, upon a mortgage executed by W. D. of, *&c.*, to the said R. S.; which mortgage is a lien upon the whole premises aforesaid, and is dated the —— day of ——, 18— [*or*, that the sum of five hundred dollars, and interest thereon from the —— day of ——, 18—, is due to R. S. of, *&c.*, who is the owner of a judgment [*or* decree], obtained by the said R. S., against W. D., of, *&c.*; which judgment [*or* decree], was docketed in the clerk's office of the county of ——, on the —— day of ——, 18—, and is a lien upon the whole premises aforesaid.

[*If creditors are made parties to the suit, having either general or specific liens on the premises, or any part thereof, state the nature thereof, and the amounts due upon such liens, respectively.*]

All which is respectively submitted. Dated, &c.

L. F., Referee.

No. 251.

Report as to Party having Right of Dower.

See ante, pp. 352, 366.

And I do further report that the defendant R. H., as widow of L. H., deceased, is entitled to her right of dower in all the lands and premises mentioned and described in the plaintiff's petition [*or*, in the one undivided fifth part of all the lands and premises mentioned and described in the plaintiff's petition], and that such interest or estate, should not be excepted from such sale, but should be sold, for the reason that, *&c.* [*state the reasons*].

No. 252.

Notice of Motion Confirming Report.

[*Same substantially as in No.* 220.]

No. 253.

Order directing a Sale of the Premises.

See ante, p. 357.

[*Title as in No.* 202.] At, *&c.* [*as in No.* 6.]

The defendants J. K., R. D., and owners unknown, having failed to appear in this cause, or to put in any answer to the petition of A. B.,

the plaintiff; herein, and the guardian ad litem ofthe defendant C. D., having put in the usual general answer; and the report of L. F., Esq., referee, duly appointed by an order of this court, dated the —— day of ——, 18—, having been made to the court, by which report it appears, among other things, that an actual partition of the premises described in said petition, cannot be made without great prejudice to the owners thereof; and that a sale of the whole of said premises is necessary and expedient; and after hearing L. P. C., of counsel for the plaintiff, and T. C., of counsel for the guardian ad litem of the infant defendant C. D., and due deliberation being thereupon had, it is ordered that the said report be, and the same is, hereby approved, ratified, and confirmed.

And it is further ordered and adjudged, and this court does further order, adjudge, and declare, that the rights, titles, and interests of the parties in the premises, aforesaid, so far as the same have appeared, are such as are stated in the said report, and are as follows, viz: [*state the rights and interests of the parties respectively, and the shares to which they are entitled; and if the shares of any of the parties are incumbered, by any general or specific lien, set it out with the name of the owner thereof, the nature of such lien, the amount due thereon, &c.*]

And it is further ordered and adjudged, that all and singular the premises mentioned in the said petition, and particularly described therein, together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, to wit: all, *&c.* [*describe premises*], be sold at public auction, in the county of ——, where the said premises are situated, by W. B. B., referee, residing in that county, and who is hereby appointed such referee for that purpose. That the said referee give six weeks' notice of the time and place of such sale, in one of the public newspapers printed in said county, and in such other manner as is required by law.

And it is further ordered, that a credit of —— months [*or*, years], be given for one third [*or*, one half, *or such other portion as the court may direct*], of the purchase-money of said premises, to be secured at interest by one or more mortgages on the premises sold, and also by the bond or bonds of the purchaser, conditioned for the payment of the said one-third, [*or*, one half, *&c.*,] of the said purchase money in —— months [*or*, years] from the date of said sale; and also by, *&c.* [*such other security as the court may direct*].

And it is further ordered, that the said referee bring into court and pay to the treasurer of said county of ——, the portion of the

purchase money arising from the sale of the estate or interest of J. K., one of said defendants, in the premises aforesaid, after deducting the portion of the costs, charges, and expenses to which it shall be liable. [*If portion of any other of the parties is incumbered, add a like order as to that.*]

And it is further ordered, that the said referee forthwith, after the said sale, make report to this court of his proceedings thereon; and that after the said report shall have been duly confirmed, then that he execute a deed or deeds of the said premises to the purchaser or purchasers at the said sale, on their complying with the conditions upon which the deeds were to be delivered; and that such sale be valid and effectual forever.

And it is further ordered, that the costs and expenses of the proceedings in this suit, which are adjusted according to law, at the sum of —— dollars, be deducted from the proceeds of the said sale, and that the said referee pay the same to the said A. B., or to his attorney. That the said referee in like manner deduct from the said proceeds the fees and disbursements to which he is entitled on such sale.

And it is further ordered, that the said referee pay to the said A. B., or bring into court for his use, the one-fifth part of the residue of the proceeds arising from said sale.

And it is further ordered, that the said referee bring into court for the use of C. D., an infant defendant in this suit, and pay to the treasurer of said county [*or*, that the said referee pay to the general guardian of C. D., an infant, and one of the defendants herein, for the use of such infant] the one-fifth part of the said residue. And the said treasurer [*or*, general guardian] is hereby directed to invest the said moneys on bond and mortgage upon unincumbered real estate of at least double the value of the moneys so invested; which investment shall be made in the name of such infant [*or*, in the name of such guardian].

And it is further ordered, that the said referee bring into court and pay to the treasurer of said county, the one-fifth part of said residue for the use of the owners unknown mentioned in the petition in this cause. And the said treasurer is hereby directed to invest the said moneys in permanent securities at interest, for the benefit of such unknown owners. [*If any of the parties are absentees, without legal representatives in this State, add a like order as to their share.*]

And it is further ordered that such title deeds and writings as may be in the possession or under the control of any of the parties, and as

appear to relate solely to the said premises, or any part thereof, be delivered up to any person or persons who may on such sale, become the purchaser or purchasers thereof. And that all other title deeds or writings may be deposited with the clerk of the county of ——, for safe custody, there to remain for the benefit of all parties interested therein.

And it is further ordered, that the purchaser or purchasers of said premises, or of any part thereof, at such sale, be let into possession thereof; and that any of the parties who may be in possession of said premises, or any part thereof, and any person, who, since the commencement of this suit, has come into the possession of the said premises, or any part thereof, deliver possession thereof to such purchaser or purchasers, on production of the referee's deed for such premises.

And it is further ordered, that the said referee make a report of his proceedings, under this order, subsequent to the confirmation of his report of sale, to be made as above directed.

No. 254.

Order where a Party has a Right of Dower, &c.

See ante, pp. 352, 366.

And the court having duly considered and determined that the dower interest of the defendant R. H. in the said premises, should not be excepted from said sale, but that the same should be sold, it is further ordered, that the said referee ascertain and report whether the said defendant R. H. is willing to accept in lieu and instead of her said dower interest, a sum in gross, in satisfaction thereof, out of the net proceeds of the said premises, according to her rights as ascertained in the report of said referee, dated the —— day of ——, 18—; and also what would be a reasonable satisfaction for her said interest, on the principles applicable to life annuities. And if the said R. H. consents to accept such gross sum, that said referee pay the same to her, upon her executing, acknowledging, and delivering to him a release to be approved of by said referee, of all her right, title, and interest, of, in, and to the said premises, and every part thereof. But if the said R. H. shall refuse to accept a gross sum in lieu of her dower interest, then it is further ordered that the said referee do bring one third of the net proceeds of the said sale into court, to be invested for her benefit, the interest or dividends thereon, or to accrue thereon, to be paid over to her during her natural life.

No. 255.

Notice of Sale.

[*Same as in No.* 228 *ante, with necessary alterations.*]

No. 256.

Referee's Report of Sale.

See ante, pp. 357, 354.

[*Title as in No.* 202.]

To the Supreme Court of the State of New York:

In pursuance of an order of this court, made in the above cause, dated the —— day of ——, 18—, I, the subscriber, referee, residing in the county of ——, to whom the execution of said order was confided, do report:

That having, *&c.* [*as in No.* 229, *ante, with the necessary changes, so as to make it the report of a referee, &c., instead of commissioners.*]

No. 257.

Order Confirming Referee's Report.

See ante, pp. 354, 357, note.

At, *&c.* [*as in No.* 6].

[*Title, as in No.* 202.] On reading and filing the report of W. B. B., appointed referee to sell the premises described in the petition in this cause, whereby it appears, *&c.* [*insert the substance of the report*]

Now, on motion of L. P. C., attorney for the plaintiff, it is ordered that the said sale be, and the same is hereby, ratified, approved and confirmed.

And it is further ordered, that the said referee execute a conveyance for the said premises to the said S. P., pursuant to such sale.

No. 258.

Deed of Referee.

[*Same as No.* 231, *with the necessary alterations; and see ante, p.* 358.]

No. 259.

Final Report of Referee, after a Sale.

See ante, pp. 357, 359.

[*Title as in No.* 202.]

To the Supreme Court of the State of New York:

In pursuance of an order of this court, made in the above cause, dated the —— day of ——, 18—, I, the subscriber, referee, do report:

That in obedience to the said order, I have executed, acknowledged,

and delivered to S. P., the purchaser of the premises ordered to be sold by me, a deed of the said premises, on receiving from him the sum of —— dollars, the price for which the said premises were sold to him, as mentioned in my former report of such sale, and upon his complying with all the conditions upon which the said deed was to be delivered.

I further report that I have paid to the attorney for the plaintiff in this suit, the sum of —— dollars, for the costs and expenses of the proceedings in this suit, and have taken a receipt therefor, which is hereunto annexed; that I have retained from the proceeds of said sale the sum of —— dollars, for my fees and disbursements upon said sale.

And I further report, that I have paid to A. B., the plaintiff in this suit, the sum of —— dollars, being his share of the said proceeds, after the deductions aforesaid, and have taken a receipt therefor, which is hereto annexed.

I further report, that I have brought into court, and paid to the treasurer of the county of ——, the sum of —— dollars, being the share or interest of J. K. in the residue of the said proceeds, as aforesaid, and have taken a receipt for the same, which is hereto annexed. [*Add a similar order as to the shares of absentees and unknown owners.*]

That I have also brought into court for the use of C. D., an infant defendant in this suit, and have paid to said treasurer [*or*, that I have paid to the general guardian of C. D., an infant, and one of the defendants herein, for the use of such infant], the sum of —— dollars, being the share or interest of said C. D. in the residue of said proceeds, and have taken a receipt therefor, which is hereto annexed.

[*If a credit was given for any portion of the purchase money, on the security directed to be taken by the court, state the facts with reference thereto.*]

All which is respectfully submitted.

Dated, *&c.* W. B. B., Referee.

No. 260.

Report as to Widow's Right of Dower.

See ante, pp. 352, 366.

And I do further report, that the defendant R. H., being willing to accept, in lieu of her dower interest in the said premises, a sum in gross, in satisfaction thereof, out of the net proceeds of the said premises, I computed the value of the said dower interest upon the principles of law applicable to life-annuities, and ascertained the same to be —— dollars. And the said R. H., having consented to accept that

sum, I have paid the same to her, and have taken a release from her, duly executed and acknowledged, and approved by me, of all her right, title and interest of, in and to the said premises, and every part thereof, which release is hereto annexed.

No. 261.

Order confirming Final Report.

See ante, p. 357.

At, *&c.* [*as in No.* 6].

[*Title, as in No.* 202.] On reading and filing the report of W. B. B., referee, duly appointed by an order of this court, dated the —— day of ——, 18—, by which report it appears that the said referee has executed, acknowledged, and delivered to S. P., the purchaser of the premises sold by the said referee, a deed thereof, and that he has distributed the net proceeds of the sale of the said premises in the manner directed by the order of the court, and that the said referee has annexed to his report, the receipts of the several persons to whom the said net proceeds were directed to be paid: Now, on motion of L. P. C., attorney for the plaintiff, it is ordered that the said report be , and the same is, hereby approved and confirmed.

CHAPTER X.

FORMS IN PROCEEDINGS AS FOR CONTEMPTS.

No. 263.

Affidavit of service of Order to pay Money, and of Demand of Payment.

See ante, p. 378.

SUPREME COURT [*or other court*].

A. B.
ag'st
C. D.

County of ——, ss.: M. T. G., of, *&c.*, being duly sworn, says, that on the —— day of ——, 18—, he served upon C. D., above named, a copy of the order hereto annexed, by delivering the same to, and leav-

ing the same with, the said C. D., at his residence in ——, in said county; and that at the time he so served the said copy, he showed him the said order hereto annexed.

And deponent further says, that at the time of the service of such copy of order, as aforesaid, he personally, on behalf of said A. B., demanded of said C. D., payment of the costs [*or*, moneys], mentioned in said order; but the said C. D. neglected and refused to pay the same, or any part thereof.

And deponent further says, that the said demand was made on behalf of the plaintiff in this action, and that deponent was duly authorized to make such demand, as appears by the power of attorney hereto annexed. And that at the time the said demand was made, deponent stated to the said C. D. the nature of his authority, and showed him the said power of attorney.

Sworn, *&c.* M. T. G.

[*Annex order and power of attorney.*]

No. 264.

Order for Precept to Commit for Non-payment of Money.

See ante, pp. 378, 380, 412.

[*Title, as in last form*]. At, *&c.* [*as in No.* 6].

On reading and filing the affidavit of M. T. G., dated the —— day of ——, 18—, showing due personal service on the defendant, of a copy of the order made in the above action, on the —— day of ——, last, and also showing a demand of the payment of the costs [*or*, moneys], mentioned in said order, of the defendant personally, and of his neglect and refusal to pay the same or any part thereof; and the costs of this proceeding to compel such payment, having been fixed by the court at —— dollars;

Now, on motion of L. P. C., attorney for the plaintiff, it is ordered that a precept be issued out of, and under the seal of this court, directed to the sheriff of the county of ——, commanding him to take the body of the said C. D., if he shall be found in his bailiwick, and commit him to the common jail of said county of ——, and to keep and detain him therein, under his custody, until he shall pay the sum of —— dollars, as required by said order, and also the further sum of —— dollars for the costs and expenses of the proceeding to compel such payment, together with the sheriff's fees on such precept.

No. 265.

Precept to Commit for Non-payment of Money.

See ante, pp. 378, 380.

The People of the State of New York. To the sheriff of the county of ——, greeting:

[Seal]. Whereas, on the —— day of ——, 18—, by a certain order made in our Supreme Court [*or other court*], in a certain action depending in our said court, wherein A. B. is plaintiff, and C. D. is defendant, it was ordered that the said C. D., pay to the said A. B., the sum of —— dollars, for, *&c.* [*state for what the moneys were ordered, &c.*] And, whereas, we have been informed in our said court that although the said sum of —— dollars has been personally demanded of the said C. D., by or in behalf of said A. B., yet the said C. D. has hitherto neglected and refused, and still neglects and refuses to pay the same; and whereas the costs and expenses of the proceeding on the part of the said A. B., to compel payment thereof amount to —— dollars;

Now, therefore, we command you to take the body of the said C. D., if he shall be found in your bailiwick, and commit him to the common jail of the county of ——, and keep and detain him therein under your custody, until he shall pay the said sum of —— dollars for the said moneys so ordered to be paid; and also the said sum of —— dollars for the costs and expenses of the proceeding to compel such payment, together with your fees on this writ. And you are to make and return to our said court on the —— day of —— next, at the county clerk's office in said county of ——, a certificate, under your hand, of the manner in which you shall have executed this our writ; and have you then there this writ.

Witness C. L. A., one of the justices of our said court, at ——, the —— day of ——, one thousand eight hundred and ——.

L. P. C., Attorney. N. B. M., Clerk.

(*Endorsed:*) "By the Court."

N. B. M., Clerk.

No. 266.

Notice to Sheriff to Return Process, &c.

See ante, p. 394.

[*Title as in No.* 263.] To H. R., Sheriff of the County of ——:

Sir: You are hereby notified to return the execution in the above cause, delivered to you on the —— day of —— last, within ten days

after the service of this notice, or show cause at a special term of this court, to be held at the village of ——, in the county of ——, on the —— day of —— next [*or*, instant], why an attachment should not issue against you. Dated, *&c.*

L. P. C., Atty. for Plaintiff.

No. 267.

Affidavit to obtain Attachment against a Sheriff.

See ante, pp. 392, 394.

[*Title as in No.* 263.]

County of ——, ss.: L. P. C., being duly sworn deposes and says: He is the attorney for the plaintiff in the above entitled action. That judgment was duly entered against the defendant in this action, for the sum of —— dollars, and the judgment roll therein duly filed with the clerk of said county, on the —— day of ——, 18—. That on the —— day of —— last, he delivered to H. R., Esquire, sheriff of said county of ——, an execution in this action, for —— dollars and interest from the —— day of ——, 18—, directed to the said sheriff, by delivering the same to, and leaving the same with, the said sheriff, at his office in the village of ——, in said county [*or*, with J. R. L., undersheriff of the said county, at his residence in the village of ——, in said county, *or otherwise, according to the mode of delivery.*]

And deponent further says, That on the —— day of —— last [*or*, instant], he served the said sheriff with a true copy of the notice hereto annexed, by delivering the same to, and leaving the same with, the said sheriff, at his office in the village of ——, in said county.

And deponent further says, That he has this day searched in the office of the clerk of said county for the said execution; but the same has not been returned to said office, although sufficient time has elapsed therefor; and that no part of said execution has been paid to deponent or to said plaintiff.

Sworn, *&c.* L. P. C.

No. 268.

Writ of Attachment against Sheriff.

See ante, p. 392.

The People of the State of New York, To the Coroners of the County of ——, greeting: We command you that you attach H. R., Esq., sheriff of our said county, so that you may have his body [SEAL.] before our Supreme Court, at a special term thereof, to be held at the Court House in ——, on the —— day of —— next,

there to answer unto us, as well touching the contempts which he, as is alleged, hath committed against us, as also such other matters as shall then and there be laid to his charge; and further to perform and abide such order as our said court shall make in this behalf; and have you then there this writ, and make and return a certificate under your hand, of the manner in which you shall have executed the same.

Witness, A. B. J., one of the justices of our said court, the —— day of ——, one thousand eight hundred and ——.

L. P. C., Attorney. N. B. M., Clerk.

[*Endorsed:*] In Supreme Court: The People of the State of New York, *ex rel.* A. B. *vs.* H. R., sheriff of the county of ——. Attachment; returnable the —— Tuesday of ——, 18—.

L. P. C., Attorney.

Let the defendant give security for his appearance, in the sum of —— dollars. A. B. J., Justice of the Supreme Court.

Dated, *&c.*

No. 269.

Order for a Habeas Corpus to bring up the Defendant.

See ante, p. 397.

At, *&c.* [*as in No.* 6.]

[*Title as in No.* 263.] An attachment having issued in the above entitled action against the defendant therein, for a contempt of court, directed to the sheriff of the county of ——; and the said sheriff having returned to the said writ that, *&c.* [*set forth the return showing the defendant to be already in custody*]. Now, on reading the said attachment, and the return thereon endorsed, and on motion of L. P. C., attorney for the plaintiff; it is ordered, that a writ of habeas corpus do issue, directed to the said sheriff, ordering him to bring the said defendant forthwith before this court, at the village of ——, to answer for the said contempt.

No. 270.

Habeas Corpus to bring up the Defendant.

See ante, p. 397.

The People of the State of New York, To the sheriff of the [SEAL.] county of ——, greeting: We command you that you have the body of C. D., detained in your custody, by virtue of an execution against his body [*or*, under a commitment for a contempt], under safe and secure conduct, together with the day and cause of his

being taken and detained, by whatsoever name he may be called in the same, before the special term of the Supreme Court, at the village of —— forthwith, to answer A. B. in a proceeding as for a contempt; and further to do and receive all and singular those things which our said court shall then and there consider of him in this behalf; and have you then there this writ. And further, that you detain the said C. D., at the place last aforesaid, until some order is made by our said court for his disposition.

Witness A. B. J., one of the justices of our said court, at ——, the —— day of ——, one thousand eight hundred and ——.

L. P. C., Attorney. N. B. M., Clerk.

[*Endorsed :*] "By the Court."

N. B. M., Clerk.

No. 271.

Affidavits to obtain Attachment other than against Sheriff, or for Non-payment of Money.

See ante, pp. 392, 395.

[*Title as in No.* 263.] County of ——, ss. M. T. G., of, *&c.*, being duly sworn, says: That on the —— day of ——, 18—, he served upon C. D., above-named, a copy of the original injunction order hereto annexed, by delivering the same to, and leaving the same with, the said C. D., at his residence in the village of ——, in said county; and that at the time of such service he showed the said C. D. the said original order annexed. [*Or*, That on the —— day of ——, 18—, he served upon C. D., above-named, a copy of the injunction order hereto annexed, duly certified by the county clerk of said county, by delivering the same to, and leaving the same with, the said C. D., at his residence in the village of ——, in said county.]

Sworn, *&c.* M. T. G.

[*Title as in No.* 263.] County of ——, ss. A. B., of ——, in said county, being duly sworn, says: He is the plaintiff in the above entitled action; that, as he is informed and believes, the injunction order hereto annexed was duly served upon the defendant, on the —— day of ——, 18—; that since that time the defendant has repeatedly violated said order; that he has cut and carried away from the premises described therein, within the last ten days, large quantities of timber, in direct violation of the same; that deponent is the owner of said premises, *&c.*, *&c.* [*setting forth the facts showing the interest of the plaintiff and the misconduct alleged*]. A. B.

Sworn, *&c.*

[*Title as in No.* 263.] County of ——, ss. J. K., of ——, in said county, being duly sworn, says: He is acquainted with the parties to the above action, and resides within half a mile of the premises described in the injunction order hereto annexed; which premises are owned by the plaintiff, but are now occupied by said defendant; that deponent has seen said defendant, several times within ten days last past, engaged in cutting and removing the timber growing upon the said premises; that the said defendant has cut and carried away twenty or more loads of wood and other timber from said premises, within the time aforesaid, *&c.*, *&c.* [*setting forth the facts and circumstances showing a breach of the injunction, or other contempt complained of*].

No. 272.

Order to show Cause why Attachment should not Issue.

See ante, p. 396.

At, *&c.* [*as in No.* 6].

[*Title as in No.* 263.] On reading and filing the affidavits of A. B., above-named, and others, showing the violation, by the defendant, of the order of injunction issued in the above action, on the —— day of ——, 18—, [*or other contempt*], and on motion of L. P. C., attorney for the plaintiff, it is ordered, that the defendant, C. D., show cause at the special term of this court now sitting at the Court House in the village of —— [*or*, at the next special term of this court to be held at the Court House in ——, on the —— day of ——, instant], why an attachment should not be issued against him, and why he should not be punished for his alleged misconduct.

And it is further ordered, that copies of the affidavits and other papers on which this order is made, be served upon the defendant, personally, at least —— days previous to the said —— day of ——, 18—.

No. 273.

Notice of Motion for an Attachment.

See ante, pp. 392, 396.

[*Title as in No.* 263.]

Sir,—Take notice that I shall apply to the next special term of this court, to be held at the Court House in ——, in the county of ——, on the —— day of —— next, at the opening at the court, on that day, or as soon thereafter as counsel can be heard, for an order that an attachment, as for a contempt, be issued against the defendant

C. D., for the violation of the order of injunction issued in this action; and for such other or further order or relief, as the court may think proper to grant; which motion will be founded upon the affidavits, with copies whereof you are herewith served. Dated, *&c.*

Yours, &c. L. P. C., Attorney for Plaintiff.

To H. G., Esq., Attorney for Defendant.

No. 274.

Order for an Attachment.

See ante, pp. 392, 396.

[*Title as in No.* 263.] At, *&c.* [*as in No.* 6.]

On reading and filing the affidavits of A. B., above named, and others, showing the violation, by the defendant, of the order of injunction issued in the above action on the —— day of ——, 18—, and on motion of L. P. C., attorney for the plaintiff, after hearing H. G., for the defendant. It is ordered, that an attachment as for a contempt be issued against the defendant, C. D., returnable at the next special term of this court, to be held at the Court House in ——, on the —— day of ——, 18—. [And it is further ordered, that the said C. D., be held to bail on said attachment in the sum of —— dollars.]

No. 275.

Writ of Attachment; Endorsement and Officer's Return.

See ante, pp. 392, 400.

[Seal] The People of the State of New York, to the sheriff of the county of ——, greeting:

We command you that you attach C. D., so as to have his body before our Supreme Court at the next special term thereof, to be held at the Court House in ——, on the —— day of ——, 18—, there to answer unto us, as well touching the contempt which he, as is alleged, hath committed against us, as also such other matters as shall then and there be laid to his charge, and further to perform and abide such order as our said court shall make in this behalf. And have you then there this writ; and make and return a certificate under your hand of the manner in which you shall have executed the same.

Witness A. B. J., one of the justices of our said court, at ——, the —— day of ——, 18—.

L. P. C., Attorney. N. B. M., Clerk.

How Endorsed.

[*If the attachment is issued by the special order of the court, it is*

to be endorsed as follows: "Issued by the special order of the court." N. B. M., clerk; *or*, "Issued by the special order of the court. Hold the defendant to bail in the sum of —— dollars." N. B. M., clerk.]

[*If issued of course, without the special order of the court, it may be endorsed thus:* "Let the defendant give security for his appearance by bond, in the penalty of —— dollars." Dated, *&c.*. A. B. J., Justice of Sup. Court.]

Sheriff's Return to Attachment.

[*If the attachment is served, and bail is given by the defendant, the return is:* "I have attached and let the defendant at large on bail; and the bond taken by me is herewith returned." J. R. G., Sheriff.]

[*If the defendant cannot be found, the return is:* "Not found."]

[*If, upon the defendant's arrest, bail is not given, the return is:* "By virtue of the within attachment, I have arrested the defendant, C. D., and for want of bail, have him now here in custody before the court."]

[*If the attachment is placed in the hands of the sheriff at too late a time to enable him to execute it before the return day, the return is:* "The within attachment was not received by me in time to arrest the defendant thereon, and bring him before the court on the return day thereof."]

[*If the defendant is already in custody, the return is:* "I have arrested the defendant on the within writ; but he is now, and was, before such arrest, in my custody by virtue of an execution against his body [*or otherwise, as the case may be*], issued out of the Supreme Court, at the suit of S. T."]

No. 276.

Bond on Attachment.

See ante, p. 399.

Know all men by these presents, that we, C. D., of the town of ——, and W. M., and J. F., of the same place, farmers, are held and firmly bound unto J. R. G., sheriff of the county of ——, and his assigns, in the penal sum of —— dollars, to be paid to the said J. R. G., sheriff as aforesaid, and his assigns. For which payment well and truly to be made, we bind ourselves jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated the —— day of ——, 18—.

Whereas, the above named C. D. has been arrested upon an attach-

ment issued out of the Supreme Court of the State of New York [*or other court, according to the fact*], in a proceeding as for a contempt, for disobedience to an order of injunction, issued in a certain action pending in said court, wherein A. B. is plaintiff, and the said C. D. is defendant, and is now in the custody of the said J. R. G., as sheriff, as aforesaid.

Now, therefore, the condition of this obligation is such, that if the above bounden C. D. will appear on the return of said attachment at the next special term of this court, to be held at the Court-House in ——, on the —— day—— next, and answer to the said alleged contempt, and abide the order and judgment of the court thereupon, then this obligation to be void, otherwise to remain in full force and virtue.

C. D. [L. s.]
W. M. [L. s.]
J. F. [L. s.]

Sealed and delivered in the presence of
R. S.

No. 277.

Order for Alias Attachment where Defendant Fails to Appear.

See ante, p. 401.

At, *&c.* [*as in No.* 6].

[*Title, as in No.* 263.] The sheriff of the county of ——, having returned the writ of attachment heretofore issued in this action, against the above-named defendant, C. D., by which return it appears that the defendant was arrested, and afterwards set at liberty on bail, and that the bond given by the said defendant has been duly returned by the said sheriff; and the said defendant being now called, in open court, and failing to appear, it is, on motion of L. P. C., attorney for the plaintiff, ordered (*) that an alias attachment issue against the said C. D., directed to the said sheriff, returnable before the next special term of this court, to be held at the Court-House, in ——, on the —— day of —— next. [And it is further ordered, that the said C. D. be held to bail on the said alias attachment in the sum of —— dollars.]

No. 278.

Order directing Prosecution of Bond.

See ante, p. 401.

[*Same as last form to the asterisk* (*), *and then continue:*] that the bond so given by said defendant, be prosecuted; and that the

said plaintiff, A. B., be, and he hereby is, authorized to prosecute the same [*or*, and that the same be prosecuted by the district attorney for said county, in the name of such sheriff.]

No. 279.

Order on appearance of Defendant, and directing Interrogatories to be filed.

See ante, p. 404.

[*Title, as in No.* 263.] (*a*) At, *&c.* [*as in No.* 6].

The defendant C. D., being charged with a contempt of court in violating an order of injunction issued in this action on the —— day of —— 18—, and a writ of attachment having issued against him for such contempt, directed to the sheriff of the county of ——, returnable on the —— day of ——, instant; whereupon the said sheriff has returned that he had attached the said defendant, and had let him at large on bail [*or* that he had attached the said defendant and had him in custody before the court], and the said defendant, now being, by virtue of such attachment, personally before the court, and denying that he is guilty of the misconduct charged, as aforesaid, against him; it is, on motion of L. P. C., attorney for the plaintiff, ordered that the said plaintiff do forthwith [*or*, within —— days], file in the office of the clerk of this court, interrogatories, specifying the facts and circumstances alleged against the said defendant; and that he serve a copy thereof upon the said defendant [*or*, the attorney of the said defendant], and that the said defendant put in written answers to such interrogatories, upon oath, and file the same with said clerk, within twenty-four hours after the time when such interrogatories are served on him.

And it is further ordered, that it be referred to J. I. L., Esq. counselor-at-law, residing in the county of ——, to examine the said defendant on oath, upon the said interrogatories; and to take such further proofs as either party may produce before him, in relation to the misconduct alleged, and that he report such answers and proofs to this court.

And it is further ordered, that the said defendant attend before the said referee, in the custody of said sheriff; and that the said sheriff detain the said defendant in his custody until the further order of the court.

(*a*) If the attachment is issued against a person not a party to the original suit, the order and subsequent proceedings should be entitled thus: "The People of the State of New York, *ex rel.* A. B., against G. D." See *ante*, p. 395.

No. 280.

Interrogatories to be Administered to Defendant.

See ante, p. 404.

[*Title, as in last form.*]

Interrogatories to be administered to C. D., above-named, touching a contempt alleged against him, for the violation of the order of injunction issued in this action; which interrogatories are hereby exhibited pursuant to an order of this court, dated the —— day of ——, 18—.

First Interrogatory. Were you, or were you not, on or about the —— day of ——, last, or at any other and what time, served with a copy of an order of injunction, issued in this cause on the —— day of —— last? Was, or was not, such order served upon you by showing you the original order of injunction, signed by the judge granting the same, and leaving with you a copy thereof? [*or*, by delivering to, and leaving with you, a copy of said order, certified by the county clerk of the county of ——?] When, and by whom was this service made? Answer this interrogatory fully and particularly.

Second Interrogatory. [*Proceed, in the form above, with such questions, as will show, or tend to show, the defendant guilty of the misconduct charged.*]

No. 281.

Interrogatories to be Administered to Sheriff.

See ante, p. 404.

In Supreme Court.

The People of the State of New York ex rel. A. B.
against
G. D., Sheriff of the County of ——.

Interrogatories to be administered to G. D, Esquire, sheriff of the county of ——, touching a contempt alleged against him, in not returning an execution issued out of this court, in favor of A. B., plaintiff, against C. D., defendant.

First Interrogatory. Did you or not, at any and what time, receive a certain execution, to you directed as the sheriff of the county of ——, between A. B., plaintiff, and C. D., defendant, dated the —— day of ——, 18—, in which you were directed to levy of the defendant's goods and chattels, the sum of —— dollars, with interest thereon from

the —— day of ——, 18—, besides your fees? Declare fully and particularly.

Second Interrogatory. Did you or not execute the said execution? If yea, in what manner, and at what time in particular? If nay, why did you not execute the same? Declare fully.

Third Interrogatory. Did you or not receive from L. P. C., plaintiff's attorney, in the said action of A. B. against C. D., a notice in writing, requiring you to return the said execution within ten days, or show cause why an attachment should not be issued against you? If yea, what was the purport of that notice, and when did you receive it? Answer fully.

Fourth Interrogatory. Have you or not returned the said execution? If yea, when, where, and how in particular? If nay, why have you not returned the same? Declare fully and particularly.

Dated, *&c.* L. P. C., Atty. for Plff.

No. 282.

Answer to Interrogatories.

See ante, pp. 404, 407.

[*Title, as in the Interrogatories.*]

The answer and examination of C. D. [*or*, G. D., sheriff of the county of ——], above named, to the interrogatories exhibited by the plaintiff for his examination, pursuant to an order of this court, dated the —— day of ——, 18—.

First. To the first interrogatory, this examinant answers and says that, *&c.* [*insert the defendant's answer to the questions put to him.*]

C. D. [*or*, G. D.]

Sworn and subscribed before me, this —— day of ——, 18—.

J. I. L., Referee.

No. 283.

Order discharging Attachment.

See ante, pp. 404 to 408.

[*Title as in No.* 279; *and note.*] At, *&c.* [*as in No.* 6].

On reading and filing the answer of C. D. [*or*, G. D. sheriff of the county of ——] to the interrogatories filed against him in this cause, and on motion of H. G., of counsel for the said C. D. [*or*, said sheriff], it is ordered that the attachment issued in this cause be and the same is hereby discharged.

No. 284.

Order convicting Defendant of Contempt.

See ante, pp. 408 to 412.

[*Title as in No.* 279, *and note.*] At, *&c.* [*as in No.* 6].

A writ of attachment having heretofore issued out of this court against the defendant C. D., for his contempt in violating the order of injunction issued in this action, on the —— day of ——, 18—; which attachment was directed to the sheriff of the county of ——, and returnable on the —— day of —— instant; and the said sheriff having returned that he had attached the said C. D., and had let him at large on bail [*or*, that he had attached the said defendant, and had him in custody before the court], and the said C. D., having appeared personally before the court; and interrogatories, specifying the facts and circumstances alleged against the said C. D., having, by order of the court been filed, and a copy thereof having been served on said defendant [*or*, on said defendant's attorney]; and it having been referred to J. I. L., Esq., to examine the said C. D., on oath upon such interrogatories, and take such further proofs as either party might produce before him in relation to said alleged contempt; and the said referee having made his report, and it appearing to the court from such report and the answers and proofs thereto, and the original affidavits on which said attachment issued, that the said C. D. is guilty of the contempt charged against him, and that such misconduct was calculated to, or did actually, defeat, impair, impede, or prejudice the rights of the plaintiff above-named;

Now, on motion of L. P. C., attorney for the plaintiff, it is ordered, that a fine of —— dollars be, and the same is hereby, imposed upon the said C. D. for his misconduct. And it is further ordered, that the said C. D., pay to the plaintiff, the costs and expenses of these proceedings, amounting to the sum of —— dollars.

It is also further ordered, that the said C. D. be, and he is hereby directed to stand committed to the common jail of the county of ——, there to remain charged upon said contempt, until the fine imposed as aforesaid, together with the said costs and expenses, shall be fully paid, unless he shall be sooner discharged by the court; and that a warrant issue to carry this order into effect.

No. 285.

Order convicting Defendant of Contempt.—Another form.

See ante, pp. 408, 412; and 1 Duer, 571, note.

[*Title, see ante, note to No.* 279]. At, *&c.* [*as in No.* 6].

A writ of attachment having heretofore issued out of and under

the seal of this court, directed to the sheriff of the city and county of New York, against the above-named O. W. S., for contempt in disobeying an injunction granted in the action, pending in this court, of T. E. D., and C. P., as plaintiffs, against the Mayor, Aldermen and Commonalty of the city of New York, as defendants; and the said S., having been, by virtue of said attachment, attached by said sheriff, and having personally appeared in court, and interrogatories, specifying the facts and circumstances alleged against said S., having, by order of this court, been filed, and a copy thereof served on said S.; and he having been required to answer, and having answered the same; and several affidavits and papers touching the said contempt having been produced and read; and counsel, as well for the said relators as the said O. W. S., having been heard, and mature deliberation being thereupon had;

It is now here considered and adjudged, that the said O. W. S., has been, and is, guilty of the misconduct alleged against him in the proceedings, and that such misconduct was calculated to, and actually did, defeat, impair, impede and prejudice the rights and remedies of the said plaintiffs, T. E. D., and C. P., in their said action against the Mayor, Aldermen and Commonalty of the city of New York, and that the said D. and P. have, by reason of the said misconduct, been put to a large amount of costs and expenses, to wit, the sum of —— dollars.

And it is further considered and adjudged, that the said O. W. S., for his said misconduct, be imprisoned in the common jail of the city and county of New York, for the period of —— days; and further that a fine of —— dollars and —— cents, be, and the same is hereby imposed upon the said O. W. S., for his said misconduct, and that he stand committed to the common jail of the city and county of New York until the said fine be paid.

And it is further considered and adjudged, that the sum of —— dollars and —— cents, part of the said fine, be paid over to the said D. and P., or their attorneys, to satisfy their said costs and expenses in the premises; and that the residue of the said fine be paid to the clerk of this court, to be disposed of according to law, and that a warrant issue to carry this judgment into effect.

No. 286.

Warrant of Commitment.

See ante, pp. 408, 412.

The People of the State of New York, to the sheriff of the county of —— greeting:

[SEAL.] Whereas, on the —— day of ——, 18—, by an order made by the Supreme Court [*or other court*], at a special

term thereof held at the Court House in —— on the —— day of ——, 18—, in an action depending therein, wherein A. B., was plaintiff, and C. D., was defendant, it was ordered that the said C. D. be committed to the common jail of said county, there to remain charged with the contempt mentioned in said order, until he should have paid the fine therein imposed upon him for his misconduct, amounting to —— dollars, together with the costs and expenses of the proceedings for such misconduct, amounting to the sum of —— dollars; and that a warrant issue to carry the said order into effect.

Now, therefore, we command you, that you take the body of the said C. D., and him safely and closely keep in your custody, in the common jail of the county of ——, until he shall have fully paid the fine imposed, as aforesaid, to wit, the sum of —— dollars, and also the costs and expenses aforesaid, amounting to —— dollars, with your fees hereon, or until the said C. D. shall be discharged by the further order of the court. And you are to return this writ, and to make and return to our said court a certificate, under your hand, of the manner in which you shall have executed the same.

Witness, A. B. J., one of the justices of our said court, at —— the —— day of ——, 18—. N. B. M., Clerk.

L. P. C., Attorney.

[*Endorsed:*] "By the Court."

N. B. M., Clerk.

CHAPTER XI.

FORMS ON SALES OF INFANTS' ESTATES.

No. 287.

Petition for Order to Sell in behalf of Infant.

See ante, p. 422.

In Supreme Court:

To the Supreme Court of the State of New York [*or*, To the county court of the county of —— ; *or*, to the Court of Common Pleas of the city and county of New York]:

The petition of A. B., an infant over the age of fourteen years, and

of E. B., an infant under the age of fourteen years, by C. B., their mother and next friend, respectfully shows.

That your petitioner, A. B., is an infant of the age of sixteen years and upwards, and resides at ——, in the county of ——, and has no general guardian. That your petitioner, E. B., is an infant of the age of twelve years, and resides at ——, aforesaid, and has no general guardian; and that the said infants are two of the children and heirs at law of W. B., late of, *&c.*, deceased; and that as such heirs at law they are each entitled to an undivided fifth part, subject to the right of dower of the said C. B., their mother, of a lot of land situated in the town [*or*, city] of ——, in the county of ——, and State of New York, and bounded and described as follows: [*insert description*]. That the said lot of land is worth about $——; but is wholly unproductive, being wild and unimproved, [*or*, that the said lot of land is worth about the sum of $——, and produces an annual income of $——]. That the brothers of your petitioners, R. B., J. B., and S. B., own the other three-fifths of the real estate above described, and threaten to commence proceedings against your petitioners for the partition thereof.

And your petitioners further show that they do not own any other real estate than that above described; and that they have no personal estate of any kind, or to any amount whatever except their necessary wearing apparel [*or*, that each of them is the owner of an undivided fifth part of another piece or parcel of land, situated, *&c.*, which is worth about $——; but which is entirely unimproved and unproductive; and that your petitioners are each the owner of the following personal property, to wit: The said A. B., is, *&c.*, and the said E. B., is, *&c.* [*state the property, its situation and value*]. And that the property, real and personal, above mentioned, is the only property owned by your petitioners, or in which they have any interest].

And your petitioners further show, that the said C. B., the mother of the said infants, as the widow of the said W. B., deceased, the father of said infants, is entitled to dower in the real estate above described, and that she has no means of support for herself and her said infant children, except what she and they may acquire by their industry; and that it is necessary the said premises, or some part thereof, should be sold and the proceeds, or some part thereof, be applied towards the necessary education and maintenance of said infants. And the said C. B. hereby offers to unite in the sale of said premises, and to release her right of dower therein, upon condition that one

third of the purchase-money be securely invested, and the annual interest thereof be paid to her during her natural life; or that a gross sum be paid to her in lieu thereof, equal in value to her life estate therein, to be ascertained upon the principle of life annuities.

Your petitioners, therefore, pray, that the said real estate may be sold by and under the direction of this court; and that W. R., of the town [*or*, city] of ——, counselor at law, who is the uncle of [*or*, who is in no way related to] the said infants, may be appointed their special guardian for the purpose of selling the interests of said infants in said real estate. And J. N. D. and T. L., of, *&c.*, gentlemen, are proposed as sureties for the said W. R. as such special guardian, to join with him in a bond, in such penalty, and upon such condition, as shall be required.

C. B.
A. B.

STATE OF NEW YORK, }
County of ——, ss. }

On this —— day of ——, 18—, before me personally appeared C. B. and A. B., above-named, and being severally sworn, each for herself deposes and says that she has read [*or*, heard read] the above petition subscribed by her, and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on information or belief; and that as to those matters, she believes it to be true.

J. H. F., Justice of the Peace.

Consent of Guardian.

I hereby consent to be appointed the special guardian of the above petitioners, for the purposes mentioned in the above petition.

Dated, *&c.*

W. R.

Witness,
L. P. C.

No. 288.

Affidavit of Disinterested Persons.

See ante, p. 422.

STATE OF NEW YORK, }
County of ——, ss. }

E. F., farmer, of the town [*or*, city] of ——, in said county, and G. H., of the same place, being severally sworn, each for himself, deposes and says, that he is acquainted with A. B. and E. B., the petitioners named in the annexed petition, and also with their property, and the situation and value thereof. That he has read [*or*, heard read] the said

petition, and knows the contents thereof, and that the facts and circumstances therein stated are true, according to his best knowledge and belief. [*Or*, that he is acquainted with A. B. and E. B., infant children of W. B, late of, &c., deceased; that they reside in the town [*or*, city] of ——, in said county; that the said A. B. is an infant over the age of fourteen years, and has no general guardian, and the said E. B. is an infant under the age of fourteen years and has no general guardian. That he is also acquainted with the real estate described in the petition of said infants hereto annexed, and with the situation and value thereof. That the said real estate is worth about —— dollars, but is wild and unimproved, and wholly unproductive. That in the opinion of deponent a sale of said real estate would be for the benefit of said infants, and that his reasons for that opinion are the same as those stated in said petition.

E. F.

Sworn, *&c.*

G. H.

No. 289.

Order of Reference, and for Appointment of Guardian.

See ante, p. 425.

At, *&c.* [*as in No.* 6].

In the matter of the application of A. B., and E. B., infants, for leave to sell their real estate.

On reading and filing the petition of A. B., of, *&c.*, an infant over the age of fourteen years, who has no general guardian, and of E. B., an infant under the age of fourteen, who has no general guardian, by C. B., their mother and next friend, dated the —— day of ——, 18—, praying that the real estate therein described, may be sold, by and under the direction of this court; and that W. R., of, *&c.*, be appointed special guardian, for the purpose of conducting the sale; and on reading and filing the affidavits of E. F. and G. H., verifying the material facts and circumstances alleged in said petition; and it appearing satisfactorily to the court that there is reasonable ground for the application, It is, on motion of L. P. C., attorney for the said petitioners, ordered, that the said W. R. be and he hereby is, appointed the special guardian of the said infants for the purposes of the application, upon executing and filing with the clerk of the county of ——, the bond of the said W. R., and of J. N. D., and T. L., to each of the said infants, in the penalty of $——, conditioned for the faithful performance, by the said W. R., of

the trust reposed in him as such guardian, and for paying over, investing, and accounting for all moneys that shall be received by such guardian, according to the order of any court having authority to give directions in the premises; and that he will observe the orders and directions of the court in relation to such trust; which bond shall be approved of, as to its form and manner of execution by a justice of this court, signified by his approbation endorsed thereon. And it is further ordered, that it be referred to L. F., Esq., of, *&c.*, to ascertain the truth of the facts stated in said petition, and whether a sale of the premises therein described, or any and what part thereof, would be beneficial to the infant, and the particular reasons therefor; and to ascertain the value of the said premises, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the said infants, or either of them, is in absolute need of any and what part of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions; and also to ascertain the value of the life estate of C. B., the mother and next friend of said infants, in the said premises, on the principle of life annuities, by reason of her right of dower in said premises.

And it is further ordered, that no proceedings be had before said referee, until the special guardian produces a certificate of the clerk, in due form, that the security herein required, has been duly proved or acknowledged and filed, agreeably to this order.

No. 290.

Bond of Special Guardian.

See ante, p. 424.

Know all men by these presents, that we, W. R., counselor at law, of the town [*or*, city] of ——, in the county of ——, and State of New York, and J. N. D. and T. L., gentlemen, of the same place, are held and firmly bound unto A. B., in the penal sum of $——, to be paid to the said A. B., his heirs, executors, administrators, or assigns; for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the —— day of ——, 18—.

Whereas, by an order of the Supreme Court of the State of New York [*or other court*], made on the —— day of ——, the above-bounden W. R., was appointed the special guardian of A. B., an infant

over the age of fourteen years, for the purpose of selling the real estate of said infant, mentioned in said order, upon the execution of the bond therein required: Now, therefore, the condition of the above obligation is such, that if the above-bounden W. R., shall faithfully perform the trust reposed in him as such special guardian, and shall pay over, invest, and account for all moneys that shall be received by him, according to the order of any court having authority to give directions in the premises; and shall observe the orders and directions of the court in relation to such trust, then the above obligation to be void, otherwise to remain in full force and effect. W. R. [*Seal.*]

Sealed and delivered in presence of J. N. D. [*Seal.*]

G. D. T. L. [*Seal.*]

Acknowledgment of Bond.

State of New York, }
County of——, ss. } On this —— day of ——, 18—, before me personally came the above-named W. R., J. N. D., and T. L., to me known to be the individuals described in, and who executed the above instrument, and severally acknowledged that they executed the same.

J. H. F., Justice of the Peace.

Affidavit of Sureties.

State of New York, }
County of ——, ss. } J. N. D., of the town [*or*, city] of ——, in said county, and T. L., of the same place, the sureties named in the foregoing bond, being severally sworn, each for himself, deposes and says, that he is a resident and householder [*or*, freeholder] within the State of New York, and is worth the sum of —— dollars, over and above all debts and responsibilities which he owes or has incurred, and exclusive of property exempt from execution. J. N. D.

Sworn, *&c.* T. L.

Certificate of Approval of Bond [*to be endorsed on Bond*].

I approve of the within bond as to its form and manner of execution. Dated this —— day of ——, 18—.

C. L. A., Justice of the Sup. Court.

No. 291.

Certificate of Clerk. (*a*)

See ante, p. 425.

[*Title as in No.* 289.]

I do hereby certify that the bond required by the order of this

(*a*) This certificate, when obtained, is to be annexed to the referee's report. *Sup. Court Rules*, 1858, *No.* 67.

court, made on the —— day of ——, 18—, to be given by W. R., the special guardian appointed by the court in this matter, has been duly proved [*or*, acknowledged], and filed in my office agreeably to the said order. And I further certify that the said bond was approved as to its form and manner of execution by C. L. A., Esq., justice of the Supreme Court. Dated this —— day of ——, 18—.

H. S., Clerk of —— County.

No. 292.

Referee's Report.

See ante, p. 426.

[*Title as in No.* 289.]

To the Supreme Court of the State of New York [*or other proper court*]. In pursuance of an order made in this matter on the —— day of ——, 18—, by which it was referred to me to ascertain the truth of the facts stated in the petition in this matter, and to examine and report thereon, agreeably to the said order; and to ascertain the value of the life estate of C. B. in the said premises, on the principle of life annuities,

I, the subscriber, the referee aforesaid, do respectfully report, that I have been attended by L. P. C., the attorney for the petitioners, who, before proceeding with said reference, produced before me the certificate of the clerk of this court, that the bond required to be given by W. R., the special guardian appointed in this matter, had been duly proved [*or*, acknowledged] and filed in his office agreeably to the said order, and that the said bond had been approved by C. L. A., Esq., justice of the Supreme Court, which certificate is hereto annexed.

And I further report that in my opinion a sale of the whole of the real estate belonging to said infants, and described in said petition, would be for the benefit of said infants, and that the reasons for my opinion are as follows: [*state the particular reasons which in the opinion of the referee render a sale of the premises necessary or proper*].

And I do further report, that I have taken testimony and examined into the matters alleged in said petition, and from the testimony so taken, and such examination, I am satisfied, *&c.* [*state all the facts in detail, required to be ascertained and reported, and substantially as follows:*] that the said real estate, described in said petition, is worth —— dollars; that it is exceedingly unproductive, and yields only an annual income to said infants of about —— dollars; that in my opinion it will be for the interest of the said infants to have the said real estate sold upon the following terms and conditions, viz: That so much

of the proceeds of their shares or interests in the said premises as may be necessary to pay their respective proportions of the gross value of the right of dower of their mother C. B., therein, and the costs of these proceedings, be paid by the purchaser on the delivery of the deed; and that the payment of the residue of the purchase money of the interests of said infants be secured by the bond of the purchaser and a mortgage upon the said premises, to be given to the treasurer of the county of —— [*or*, to W. R., the special guardian aforesaid], in trust for the said infants, conditioned to pay the interest thereon, semi-annually, at the rate of seven per cent., per annum, and the principal in two equal installments, one of which shall be paid when the said A. B. shall arrive at the age of twenty-one years, and the other on the day when the said E. B. shall arrive at full age.

I do further report that the said infants are not in absolute need of any part of the proceeds of said sale for their support and maintenance, over and above the interest or income thereof, and their other property together with what they may earn by their own exertions.

And I do further report that C. B., the mother of the said infants who is entitled to a right of dower in said premises, is willing to join, in the said sale; and that I have ascertained the value of her life estate in the premises, on the principle of life annuities; and that the present value of the same is —— dollars.

All of which is respectfully submitted,

Dated, *&c.* L. F., Referee.

No. 293.

Order Authorizing Guardian to Contract.

See ante, p. 426.

At, *&c.* [*as in No.* 6].

[*Title as in No.* 289.] On reading and filing the report of L. F., Esq., the referee in this matter, appointed by an order of this court, dated the —— day of ——, 18—, and which report is dated the —— day of ——, 18—, from which report it appears satisfactorily to this court that the interests of the said infants will be promoted by a sale of their shares of the real estate described in the petition in this matter;

Now, on motion of L. P. C., attorney for said infants, it is ordered that the said report be, and the same is hereby, confirmed. And it is further ordered that W. R., the special guardian of said infants be, and he is hereby, authorized and empowered to contract for the sale and conveyance of all the right, title, and interest of the said infants

in and to such real estate, at a price not less than the sum specified by said referee in his report as the value thereof, and upon the terms and conditions therein specified. And it is also further ordered, that before executing any deed or instrument of conveyance of the said premises to the purchaser, or purchasers thereof, the said guardian report to this court, upon oath, the terms and conditions of the agreement made by him for the sale of said premises.

No. 294.

Report of Special Guardian, of Agreement to Sell.

See ante, p. 427.

[*Title, as in No.* 289.]

To the Supreme Court of the State of New York [*or other proper court*]:

In pursuance of an order of this court, made in the above matter, on the —— day of ——, 18—, authorizing and empowering me as the special guardian of the infants above named, to contract for the sale and conveyance of all the right, title, and interest of the said infants in and to the real estate mentioned and described in the petition of the said infants in this matter, dated the —— day of ——, 18—; and to report upon oath the terms and conditions of the agreement made by me with the purchaser or purchasers, before executing any deed or instrument of conveyance of the said premises.

I, the said special guardian, do certify and report, that I have entered into a written agreement (subject to the approval of the court), with B. P., of, *&c.*, for the sale of all the right, title, and interest of the said infants in and to the said real estate, upon the following terms and conditions: The said B. P. to pay therefor the sum of $——, as follows: So much of the said purchase-money as may be necessary to pay the respective proportions of such infants, of the gross value of the right of dower of their mother, C. B., therein, together with the costs of these proceedings, on the delivery of the deed; and the payment of the residue of the said purchase money to be secured by the bond of the purchaser, and a mortgage upon the said premises, to be given by him to the treasurer of the county of ——, or to such other person as the court may direct, in trust for the said infants, conditioned to pay the interest thereon, semi-annually, at the rate of seven per cent. per annum, and the principal in two equal installments, one of which shall be payable on the day when the said A. B. shall arrive at the age of twenty-one years, and the other on the day when the said E. B. shall arrive at that age.

I do further report that the said C. B. has executed a release of all her right of dower in and to the undivided two fifth parts of said premises owned by said infants, which release is hereto annexed; and that the gross value of such right of dower in the premises owned by said infants, is —— dollars; and the costs and expenses of these proceedings amount to —— dollars; after deducting which sums from the amount of the purchase-money, as aforesaid, there will remain the sum of —— dollars due the said infants collectively, to be secured as aforesaid, or —— dollars to each.

And I further report that the above are the best terms upon which I could sell the said property; and that, in my opinion, the premises are an ample security for the payment of the residue of the purchase-money aforesaid, and the interest thereon, as aforesaid.

All which is respectfully submitted.

W. R.

Dated this —— day of ——, 18—.

County of ——, ss. W. R., the special guardian above named, being duly sworn, says, that he has read the above report, subscribed by him, and knows the contents thereof, and that the matters therein stated are true.

W. R.

Sworn, *&c.*

No. 295.

Order confirming Report of Guardian, and directing a Conveyance.

See ante, p. 427.

At, *&c.* [*as in No.* 6.]

[*Title, as in No.* 289.]

On reading and filing the report of W. R., the special guardian of the infants above named, made in pursuance of the order of this court, dated the —— day of ——, 18—, stating that he had entered into a written agreement, subject to the approval of this court, with B. P., for the sale of all the right, title, and interest of the said infants in and to the real estate mentioned in said order, upon the terms and conditions specified in the said report; and that C. B., the mother of said infants, had executed an effectual release of her right of dower in said premises.

Now, on motion of L. P. C., attorney for the said petitioners, it is ordered that the said report, and the agreement therein mentioned, be and the same are hereby, ratified and confirmed.

It is further ordered, that the said special guardian, in the name of said infants, execute, acknowledge, and deliver to the said B. P., a good

and sufficient conveyance of all the estate, right, title, and interest of the said infants in and to the premises aforesaid, upon his complying with the terms and conditions upon which, by the said agreement, the deed was to be delivered, and that the bond and mortgage to be executed by said purchaser, be executed to the treasurer of the county of —— [*or*, to the said special guardian].

And it is further ordered, that out of the purchase-money paid by the said B. P., upon the delivery of the deed, the said special guardian pay the sum of —— dollars to C. B. for her right of dower in the shares of the said infants in the premises, and take her receipt therefor; and that he pay to the attorney for the petitioners the sum of —— dollars for the costs and expenses of these proceedings.

And it is further ordered that the moneys which shall be received by the treasurer of the county of ——, from time to time, for interest upon the bond and mortgage given by the purchaser, be paid over by him to the special guardian aforesaid, to be applied by such special guardian to the maintenance and education of said infants [*or, if the bond and mortgage are taken in the name of the special guardian, then:* that the moneys which shall be received by such special guardian, from time to time, for interest upon the bond and mortgage given by the purchaser, be applied by him to the maintenance and education of said infants.]

No. 296.

Deed by Special Guardian.

See ante, p. 427.

This indenture, made the —— day of ——, 18—, between A. B. and E. B., of, *&c.*, infant children of W. B., late of, *&c.* deceased, by W. R., their special guardian, parties of the first part, and B. P., of *&c.*, party of the second part. Whereas a petition was heretofore presented to the Supreme Court of the State of New York [*or other proper court*], by the said A. B., an infant over the age of fourteen years, and having no general guardian, and said E. B, an infant under the age of fourteen years, and having no general guardian, by C. B. their mother and next friend, praying for a sale of the right, title, and interest, of the said infants in the real estate therein mentioned; and whereas such proceedings were afterwards had in the said court, upon the said petition, that by an order of said court, made on the —— day of ——, 18—, the said W. R., was appointed the special guardian of the said infants, for the purposes of the said application, upon his giving the

security therein required; and whereas such security, duly acknowledged and approved, was subsequently filed by the said guardian, in the proper office; and whereas, by another order of the said court, made on the —— day of ——, 18—, the said W. R. was authorized and empowered, to contract for the sale and conveyance of the right, title, and interest of the said infants in such real estate, at a price not less than that specified in the referee's report referred to in said order, and upon the terms and conditions therein mentioned. And whereas, in pursuance of the last-mentioned order, the said special guardian afterwards made his report to the said court, dated the —— day of ——, 18—, stating that he had entered into an agreement, subject to the approval of said court, with B. P., of, *&c.*, for the sale of all the right, title, and interest of the said infants, in, and to the said real estate, upon the terms and conditions therein mentioned; and whereas, by another order of said court, made on the —— day of ——, 18—, it was ordered that the said report of such special guardian, and the agreement therein mentioned, be, and the same were thereby ratified and confirmed, and that the said special guardian, in the name of said infants, execute, acknowledge, and deliver to the said B. P., a good and sufficient conveyance of all the estate, right, title, and interest of the said infants, in and to the said premises, upon his complying with the terms and conditions upon which, by the said agreement, such deed was to be delivered. And whereas, the said B. P., the purchaser, aforesaid, has complied with the said terms and conditions;

Now, therefore, this indenture witnesseth, that the said parties of the first part, by their special guardian aforesaid, in virtue of the several orders aforesaid, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of —— dollars to him in hand paid, at or before the ensealing and delivery of these presents, by the party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, and conveyed, unto the said party of the second part, his heirs and assigns forever, all the right, title, and interest of the said infants, parties of the first part, of, in and to, the following described real estate and premises, situated in the town [*or*, city] of —— in said county of ——, viz: The undivided two-fifths of all that certain piece or parcel, *&c.* [*insert description*], to have and to hold the said premises with the appurtenances unto the said party of the second part, and his heirs and assigns forever.

In witness whereof, the parties of the first part, by their special

guardian, aforesaid, have hereunto set their hands and seals, the day and year first above-written.

Sealed and delivered in presence of L. P. C.

A. B. [L. S.]
E. B. [L. S.]
by W. R., their special guardian.

No. 297.

Petition to Compel Specific Performance of Contract of Ancestor.

See ante, p. 435.

To the Supreme Court of the State of New York [*or*, to the County Court of the county of ——, *or*, to the Court of Common Pleas of the city and county of New York.]

The petition of A. B., of, *&c.* respectfully shows: That on the —— day of ——, 18—, J. K., of, *&c.*, now deceased, duly entered into a written contract with L. M., of the same place, by which the said J. K., for a good and valuable consideration, covenanted and agreed to convey to the said L. M., on the —— day of ——, 18—, the following described premises, situated in the town of —— in the county of ——, and State of New York, viz.: [*describe premises.*] That the said L. M., in consideration of the promises and agreements on the part of the said J. K., covenanted and agreed to pay to the said J. K., on the said —— day of ——, 18—, the sum of —— dollars, and also on that day to execute and deliver to said J. K., the bond of the said L. M., in the penalty of —— dollars, conditioned to pay to the said J. K., on the —— day of ——, 18—, the sum of —— dollars with interest thereon annually, and also his mortgage, covering the premises aforesaid, and conditioned as aforesaid, a copy of which contract is hereto annexed, marked "A," and to which for greater particularity your petitioner refers.

Your petitioner further shows, that the said J. K., died on the —— day of ——, 18—, without performing the said contract, and leaving three adult and three infant children, him surviving. That as heirs of the said J. K., the said children are now seized of the said premises, in fee. That the names of said adult children are L. K., R. K., and B. K.; and that they reside in —— aforesaid. That the names of said infant children are A. K., who is now aged five years; C. K., who is now aged ten years, and E. K., who is now aged fifteen years. That said infant children reside in —— aforesaid, and have no general guardian.

Your petitioner further shows, that he was duly qualified and appointed by the Surrogate of the county of ——, as the executor of

the last will and testament of the said J. K. [*or*, as the administrator of the estate of the said J. K., (*a*)] late of —— aforesaid, deceased on the —— day of ——, 18—.

That your petitioner is desirous that a specific performance of the said contract, on the part of said infants, should be decreed by the court. That the said L. M., is also willing that such performance should be decreed as are also, the said adult children, as will more fully appear by the written consent of said L. M. and said adult children, which is hereto annexed, marked "B."

Your petitioner therefore prays, that an order may be entered directing the said infant children to convey to the said L. M, all their right, title and interest in and to the said premises, which they derived from the said J. K., as aforesaid, according to the terms of said contract, upon the performance by the said L. M., of the covenants and agreements to be performed by him in and by said contract, or that the guardian ad litem of said infants execute such conveyance in the name of such infants, upon the performance by said L. M., aforesaid. And for such other or further order or relief in the premises as may be just.

A. B.

[*Add jurat, as in No.* 287; *and annex Schedules mentioned in the petition.*]

No. 298.

Notice of Motion to compel Specific Performance by Infants, &c.

See ante, p. 435.

In Supreme Court [*or other court.*]

In the matter of an application to compel a specific performance by infants, of the contract of their ancestor to convey land.

Sir: Take notice, that I shall move this court at the next special term thereof, to be held at the Court House in ——, on the —— day of —— next, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order that [*follow, substantially, the prayer in the last form.*] And for such other or further relief, in the premises, as may be just.

Yours, &c. L. P. C., Att'y for Petitioner.

To L. M., *&c.*

(*a*) The application may also be made by the surviving party to the contract, or any other person interested in it. 2 *R. S.* 194, *sec.* 169, *ante, p.* 434.

No. 299.

Petition to Compel Infant Trustee to Convey.

See ante, p. 440.

STATE OF NEW YORK, }
IN SUPREME COURT. }

To the Supreme Court of the State of New York.

The petition of A. B., of, *&c.*, respectfully shows: That he is the general guardian of C. D., (*a*) an infant residing at, *&c.*, that the said infant is seized and possessed of the following lands and premises, situated in the town of ——, in the county of ——, and State of New York, and described as follows: [*insert description*], which said lands and premises are held by the said infant in trust only, for E. F., and G. H., of, *&c.* That, *&c.* [*here set forth the character of the trust, and the particular facts to show that the infant should convey the premises, &c., &c.*]

Your petitioner, therefore prays, that an order may be entered directing the said infant to execute a conveyance of the lands and premises aforesaid, with the appurtenances to the said E. F. and G. H., and their heirs and assigns, forever, or that the guardian of such infant execute such conveyance in the name of such infant. And for such other or further relief as may be just. A. B.

[*Add jurat as in No.* 287.]

No. 300.

Notice of Motion to Compel Infant Trustee to Convey.

See ante, p. 440.

IN SUPREME COURT.

In the matter of an application to compel C. D., an infant trustee, to convey real estate.

Sir,—Take notice, that I shall move this court at the next special term thereof, to be held at the Court House in ——, on the —— day of —— next, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order that [*follow substantially the prayer in the petition, ante, No.* 299]. And for such

(*a*) The petition may also be presented by any person in any way interested in the trust property, or in its transfer or conveyance. *See* 2 *R. S.* 194, *sec.* 167.

other and further relief as the court may think proper to grant, which motion will be founded upon the petition, with a copy whereof you are herewith served. Dated, *&c.*

Yours, &c., L. P. C., Att'y for A. B., Guardian, &c.

To [*names of parties inserted.*]

CHAPTER XII.

FORMS IN PROCEEDINGS FOR THE SALE OF THE REAL ESTATE OF RELIGIOUS CORPORATIONS.

No. 301.

Petition for Sale.

See ante, p. 447.

To the Supreme Court of the State of New York. [*or*, to the County Court of the county of ——, *or other court.*]

The petition of The First Presbyterian Congregation of ——, adhering to the Associate Reformed Synod, respectfully represents: That they are a religious association, duly incorporated under the act entitled "An act to provide for the incorporation of Religious Societies," passed April 5, 1813—That as such incorporated association, they are the owners of the following described piece or parcel of land, situated in the town of ——, in the county of ——, viz: All, *&c.* [*describe the real estate*].

The said petitioners further show, that they are desirous of disposing of the said real estate; and that A. B., of —— in said county, has offered and agreed to pay for the same, upon receiving title thereto, the sum of —— dollars, which sum is the fair market value of said real estate, as your petitioners verily believe.

That the following are the reasons why your petitioners wish to sell the said real estate, viz: [*state the reasons why a sale is desired.*]

Your petitioners further show, that they are indebted to various individuals, residing in said county, to an amount in the aggregate equal to, or exceeding, the whole price or consideration which they expect to receive for said real estate, as aforesaid; and that they have no property with which to pay the said indebtedness, except the said

real estate. That your petitioners are desirous that the avails of said real estate, when received by them, should be applied in payment and discharge of said indebtedness.

Your petitioners therefore pray that an order may be entered authorizing them to sell the real estate aforesaid, upon the terms aforesaid; and that the proceeds of such sale may be applied as above specified.

[*Signatures of majority of Trustees.*]

County of —— ss. J. H. C., T. S. S., E. M., and J. G. G., being duly sworn, each for himself, deposes and says: He resides in —— in said county, and is one of the trustees of the [*name of corporation.*] That the persons whose names are subscribed to the above petition compose a majority of said trustees. That he has read [*or*, heard read] the said petition, subscribed by him, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

And the said deponents, each for himself, further says: That at a meeting of the qualified members of said association, held at their meeting-house in —— in said county, on the —— day of —— last, the trustees aforesaid were duly authorized by a majority of said members, to make this application for the sale aforesaid, upon the terms aforesaid, and that the proceeds of said sale be applied as stated in said petition.

Sworn, *&c.* [*Signatures.*]

No. 302.

Order directing Sale, and Application of Proceeds.

See ante, p. 448.

At, *&c.* [*as in No.* 6].

In the matter of the petition of The First Presbyterian Congregation of ——, adhering to the Associate Reformed Synod.

On reading and filing the petition of the above named congregation, dated the —— day of ——, 18—, praying for leave to sell the real estate described in said petition, and for the direction of the court in respect to the application of the proceeds thereof; and the affidavit of J. H. C., T. S. S., E. M., and J. G. G., four of the trustees of said congregation, and composing a majority of said trustees, verifying said petition, *&c.;* and on motion of L. P. C., attorney for the petitioners, it

is ordered, that the said trustees be, and they are hereby authorized to sell the said real estate at, and for the consideration named in said petition, to wit, for the sum of —— dollars,—which said real estate is described in said petition as follows: [*describe the real estate*].

And it is hereby further ordered, that the proceeds of said sale, after paying the expenses of this application, be applied by said trustees as follows: [*state the manner in which the proceeds shall be applied*].

CHAPTER XIII.

FORMS IN SUMMARY PROCEEDINGS TO REMOVE TENANTS.

No. 303.

Notice to pay Rent or to surrender Possession.

See ante, p. 456.

To C. D.:

SIR: You will please take notice that you are indebted to me in the sum of —— dollars, for rent of the house and premises, No. —, in —— street, in the village [*or*, city] of ——, now occupied by you; and that I require the payment of said rent, on or before the —— day of ——, instant [*three days' notice*], or the possession of said premises. Dated, *&c.* Yours, &c., A. B., Landlord.

[*For form of affidavit of service of the above notice, see post, No.* 305.]

No. 304.

Notice to Quit.

See ante, p. 457.

To C. D.: Sir—You will please take notice, that you are required to surrender and deliver up possession of the house and premises, No. —, in —— street, in the village [*or*, city] of ——, which you now hold of me; and to remove therefrom, on or before the —— day of —— next, pursuant to the statute relating to the rights and duties of landlord and tenant. Dated, *&c.* Yours, &c.,

A. B., Landlord.

No. 305.

Affidavit of Service of Notice.

See ante, p. 457.

STATE OF NEW YORK,

County of ——, ss.

H. S., of ——, in said county, being duly sworn says: That on the —— day of ——, 18—, he served upon C. D., of ——, in said county, a notice of which the notice annexed is a copy, by delivering such notice to, and leaving the same with, the said C. D., at ——, in said county [*or*, by delivering such notice to, and leaving the same with, R. D., the wife of C. D. (*or*, with W. D., the son of said C. D., aged twenty years), residing on the premises mentioned in said notice]. Dated, *&c.*

Sworn, *&c.* H. S.

No. 306.

Affidavit of Demand of Possession.

See ante, p. 457.

STATE OF NEW YORK.

County of ——, ss.

H. S., being duly sworn says: That he is acquainted with C. D., residing at No. ——, in the village [*or*, city] of ——. That A. B., of, *&c.*, on the —— day of —— instant, at the residence of said C. D., demanded the possession of the house and premises so occupied by said C. D., as aforesaid, and that the said C. D. refused to surrender the possession of the same. H. S.

Sworn, *&c.*

No. 307.

Affidavit of Landlord to Remove Tenant,—Expiration of Term.

See ante, p. 459.

A. B. *agst.* C. D. } County of ——, ss. A. B., of ——, in said county, being duly sworn, says: That on the —— day of ——, 18—, he let and rented unto C. D., of ——, in said county, the house and premises, situated in the —— of —— in said county, and described as follows: [*insert description*], which said premises were so let and rented to the said C. D., for the term of one year from the —— day of —— then next, and that the said term has expired.

And deponent further says, that the said C. D., [*or*, that E. F., the assignee, *or*, under-tenant, of the said C. D.], holds over and continues in the possession of the said premises, without the permission of this deponent, his landlord. A. B.

Sworn, *&c.*

No. 398.

Like Affidavit, in Case of Tenancy at Will.

See ante, p. 459.

[*Title as in last form.*]

County of ——, ss. A. B., of ——, in said county, being duly sworn says: That on or about the —— day of —— last, he let and rented unto C. D., of the same place, during the will and pleasure of deponent, the house and premises situated in the —— of —— in said county, and described as follows: [*insert description*].

And deponent further says: That the said C. D., has held and occupied the said building and premises, as the tenant at will of this deponent, from the —— day of —— aforesaid, until the expiration of such tenancy as hereinafter mentioned.

And deponent further says, That he caused a notice in writing to be served upon the said C. D., in due form of law, on the —— day of ——, 18—, requiring the said C. D. to remove from the said premises on or before the ——day of ——, 18—. That the time within which the said C. D. was so required to remove, has expired; and that the said C. D. holds over and continues in possession of the said premises, after the expiration of such time, without permission of this deponent, his landlord. A. B.

Sworn, &c.

No. 309.

Like Affidavit, in case of Non-payment of Rent.

See ante, p. 459.

[*Title as in No.* 307]

County of —— ss.: A. B., of ——, in said county, being duly sworn, says: That on the —— day of ——, 18—, he let and rented unto C. D., of the same place, for the term of two years, from the —— day of —— last, at an annual rent of —— dollars, payable quarterly, the house and premises situated in the —— of ——, in said county, and described as follows: [*insert description*]. That the said C. D. is now justly indebted to deponent in the sum of —— dollars, and interest thereon, from the —— day of —— last, for the rent of said premises, pursuant to the agreement under which said premises are held, as aforesaid, to wit, for the quarter's rent due by the terms of said agreement, on the —— day of —— last.

And deponent further says, That he caused a notice, in writing, to be served upon the said C. D., in due form of law, on the —— day of ——, 18—, requiring payment of said rent, so due, as aforesaid, on

or before the —— day of —— last, or the possession of said premises; but which rent has not been paid, or any part thereof.

And deponent further says, That the said C. D. holds over and continues in possession of the said premises, after default in the payment of such rent, as aforesaid, and without the permission of this deponent, his landlord. A. B.

Sworn to, &c.

No. 310.

Affidavit by Agent of Landlord.

See ante, pp. 459, 461.

[*Title as in No.* 307.]

County of ——, ss.: G. H., being duly sworn, says: He is the agent of A. B., hereinafter mentioned, and is authorized to institute proceedings for the removal of C. D. from the premises hereinafter described. That, *&c.* [*proceed substantially as in the previous forms.*]

No. 311.

Summons.

See ante, p. 462.

To C. D., of ——, in the county of ——, and any other person in the possession or claiming the possession of the premises hereinafter described.

Whereas, A. B., of ——, in said county, has made oath in writing, and presented the same to me, that, *&c.* [*recite the facts contained in the affidavits presented.*]

Therefore, you are hereby required forthwith to remove from the said premises, or to show cause before me, at my office, in the —— of ——, in said county, on the —— day of ——, 18—, at —— o'clock, —. M., why possession of said premises should not be delivered to the landlord.

Witness my hand, this —— day of ——, one thousand eight hundred and ——.

A. D. W., County Judge.

[*or*, J. H. F., Justice of the Peace.]

No. 312.

Affidavit of Service of Summons.

See ante, p. 463.

County of ——, ss. H. S., of ——, in said county, being duly sworn, says, that on the —— day of ——, 18—, he served, personally,

upon C. D., of ——, in said county, the within summons, by delivering a true copy thereof to him, and at the same time showing him the said original summons. [*Or*, that on the —— day of ——, 18, he served upon C. D., of, *&c.*, the within summons, by leaving a copy thereof at the last or usual place of residence of said C. D., with R. D., the wife of said C. D. [*or*, with W. D., the daughter of said C. D., aged —— years], there residing, and that at the time of leaving such copy, as aforesaid, the said C. D. was absent from his residence aforesaid. *Or*, that on the —— day of ——, 18, he served upon C. D., of, *&c.*, the within summons, by affixing a true copy thereof upon the outside of the front door of the dwelling on the premises described in the within summons; and that at the time of affixing such copy, as aforesaid, the said C. D. was absent from his last or usual place of residence, and there was no person [*or*, no person of mature age] residing thereon.]

Sworn, *&c.* H. S.

No. 313.

Warrant to put Landlord in possession, where Tenant does not appear.

See ante, p. 464.

The People of the State of New York, to the sheriff of the county of —— [*or*, to any one of the constables of the town of ——, *or*, marshals of the city of ——, in the county of ——], Greeting:

Whereas, A. B., of ——, in said county, has made oath, in writing, and presented the same to me, that, *&c.* [*recite the facts contained in the landlord's affidavits in full*].

Whereupon I issued a summons, requiring the said C. D., and any other person in the possession, or claiming the possession, of the premises above described, forthwith to remove from the said premises, or show cause before me at my office, in ——, on the —— day of —— instant, at —— o'clock — M., why the possession of the said premises should not be delivered to the landlord; and no sufficient cause having been shown to the contrary, and I being satisfied, by due proof, of the service of said summons, do therefore command you to remove all persons from the said premises, and to put the landlord, the said A. B., into the full possession thereof.

Witness my hand, this —— day of ——, A. D. 18—.

A. D. W., County Judge.
[*or*, J. H. F., Just. Peace.]

No. 314.

Affidavit of Tenant denying Landlord's Allegations.

See ante, p. 464.

[*Title as in No.* 307.]

County of —— ss.: C. D., of —— in said county, being duly sworn, says: He is the defendant above-named. That, *&c.* [*deny specifically the facts intended to be controverted.*]

Sworn, *&c.* C. D.

No. 315.

Venire, or Precept for Jury.

See ante, pp. 465, 466.

The People of the State of New York, to the sheriff, *&c.* [*direction as in No.* 313.]

Whereas A. B., of *&c.*, has made oath, in writing, and presented the same to me, stating that, *&c.* [*recite briefly the facts stated by the landlord*]; whereupon I issued a summons requiring the said C. D. and others in possession or claiming possession of said premises, forthwith to remove therefrom, or show cause before me at a time now past, why possession of the premises should not be delivered to the said A. B., the landlord.

And whereas, the said C. D. has, by his affidavit, filed with me, denied the facts, or some of them, upon which the said summons was issued;

And whereas, a jury having been demanded, to try the issue so joined, I have nominated twelve reputable persons, competent to serve as jurors in courts of record, to form a jury for that purpose, whose names are as follows: [*insert names of Jurors.*]

You are therefore hereby commanded to summon the persons so nominated by me, to appear before me, at my office in the —— of ——, in said county, on the —— day of ——, 18—, at —— o'clock, —. M., for the purpose of trying the said matters in difference.

Witness my hand this —— day of ——, A. D., 18—.

A. D. W., County Judge.

[*or*, J. H. F., Justice of the Peace]

No. 316.

Warrant to put Landlord in Possession after Trial.

See ante, p. 468.

The People of the State of New York: to the sheriff [*or*, to any constable] of the county of ——. Greeting:

Whereas, A. B, of —— in said county, made oath, in writing,

and presented the same to me, stating that, *&c.* [*recite the facts stated by landlord*]; whereupon I issued a summons requiring the said C. D., and others in possession or claiming possession of said premises, forthwith to remove therefrom, or show cause before me at a time now past, why possession of the premises should not be delivered to the said A. B, the landlord.

And whereas, the said C. D., by his affidavit filed with me, denied the facts, or some of them, upon which the said summons was issued; and thereupon the issue, so joined, was tried before me; and after hearing the evidence of the parties, I rendered a verdict in favor of said A. B. [*or*, before a jury duly nominated by me, and summoned for that purpose, who, after hearing the evidence of the parties, rendered a verdict in favor of said A. B., to wit: that the possession of the said premises should be delivered to said A. B.;] whereupon judgment was rendered by me in favor of the said A. B., against the said C. D., in pursuance of such decision or verdict, that the possession of said premises be delivered to the said A. B.

Now, therefore, you are hereby commanded to put the said A. B. into the full possession of the premises aforesaid.

Witness, *&c.* [*as in No.* 315.]

Officer's Return to Warrant.

In pursuance of the within command, I have this day put the landlord into the full possession of the premises within described.

Dated, *&c.* H. R. C., Sheriff [*or*, constable].

No. 317.

Security to pay Rent in Ten Days.

See ante, p. 469.

In consideration of one dollar to us in hand paid, we do hereby jointly and severally engage to pay to A. B., of ——, in the county of ——, the sum of —— dollars, in ten days from this date, for the rent due him for the occupation of, *&c.* [*describe the demised premises*]. And also, for the like consideration, we jointly and severally agree to pay to the said A. B., in ten days from this date, the costs and charges of certain proceedings commenced to remove C. D., of, *&c.*, from the said premises, under the provisions of the statute authorizing summary proceedings to recover the possession of land in certain cases.

Dated, *&c.* [*Signatures of Sureties.*]

No. 318.

Security to pay Rent, where Tenant has taken the benefit of any Insolvent Act.

See ante, p. 470.

Whereas, A. B. has commenced proceedings to remove C. D., of, *&c.*, from the building and premises occupied by said C. D., in ——, in said county, under the statute relating to summary proceedings to recover possession of land, on the ground that the said C. D. has taken the benefit of an insolvent act [*or*, been discharged under the statute for the relief of his person from imprisonment]. And whereas, the said C. D. desires a stay of the said proceedings, so commenced, as aforesaid.

Now, therefore, the undersigned, in consideration thereof, and of one dollar to us in hand paid, do hereby agree to pay to the said A. B. the rent of said premises, as the same shall become due, according to the agreement under which the said premises are held.

Dated, *&c.* [*Signatures of Sureties.*]

No. 319.

Affidavit of Title in Tenant, subsequently Acquired, &c.

See ante, p. 470.

[*Title, as in No.* 307.]

County of ——, ss.: C. D., of ——, in said county, being duly sworn, says: He is the defendant above named. That he claims the possession of the premises described in the affidavit of A. B., the plaintiff, dated the —— day of ——, 18—, by virtue of a right or title acquired to the same after the sale of said premises as mentioned in the affidavit of said plaintiff, that is to say [*set forth particulars*]; [*or*, that he claims the possession of said premises as the guardian of R. S., a minor, under the age of twenty-one years; *or*, as the trustee for C. B., of ——, in said county]. C. D.

Sworn, *&c.*

No. 320.

Bond to Stay the Proceedings.

See ante, p. 470.

Know all men by these presents: That we, C. D., of ——, in the county of ——, and J. M., farmer, and M. M., merchant, of the same place, are held and firmly bound unto A. B., of ——, in said county, in the sum of —— dollars, to be paid to the said A. B., his executors, administrators or assigns; for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators,

firmly by these presents. Sealed with our seals; and dated the —— day of ——, 18—.

Whereas, the above-named A. B. has instituted proceedings under the provisions of the statute authorizing summary proceedings to recover the possession of land in certain cases, for the purpose of obtaining possession of the building and premises situated, *&c.* [*describe premises*], and which proceedings are founded upon an alleged sale by execution of said premises. And whereas, the said C. D. has made affidavit that he claims the possession of the said premises by virtue of a right or title acquired to the same subsequent to such alleged sale [*or*, as the guardian of R. S., a minor under the age of twenty-one years; *or*, as the trustee for C. B., of ——, in said county.]

Now, therefore, the condition of this obligation is such, that if the above-bounden C. D., shall pay the costs which may be recovered against him in any action that may be brought by the said A. B., within six months, for the recovery of the possession of such premises; and shall pay the value of the use and occupation of such premises, from the date hereof to the time the said A. B. shall obtain possession of the same by virtue of a recovery in such action; and shall not, during his occupation of said premises, commit any waste or injury to the said premises, then the above obligation to be void, otherwise to remain in full force and virtue.

C. D. [*Seal.*]
J. M. [*Seal.*]
M. M. [*Seal.*]

Signed, sealed, and delivered in presence of
J. H. F.

No. 321.

Notice of Appeal from Justice's Court to County Court.

See ante, pp. 471 to 474.

In Justice's Court.

A. B., Respondent,
ag'st
C. D., Appellant.
} Summary Proceedings.

To A. B., above-named, and to J. H. F., Esq., Justice of the Peace.

Take notice, that the above-named C. D., appeals to the County Court of the county of ——, from the judgment rendered on the —— day of ——, 18—, before J. H. F., Esq., in favor of the said A. B., against the said C. D., under the provisions of the statute authorizing summary proceedings to recover the possession of land in certain cases; and in which judgment costs were included, amounting to —— dollars.

Also take notice that the grounds upon which the said appeal is founded, are as follows: [*State all the grounds of the appeal, particularly.*] Dated, *&c.*

C. D., Appellant.

No. 322.

Undertaking on Appeal.

See ante, p. 473.

[*Title as in last form.*]

The above-named C. D., having appealed to the county court of the county of ——, from the judgment rendered against him on the —— day of ——, before J. H. F., Esq., in favor of the said A. B., under the provisions of the statute authorizing summary proceedings to recover the possession of land in certain cases, and in which judgment costs were included, amounting to —— dollars.

Now, therefore, in order to stay the execution of the said judgment, and in consideration thereof, we, J. M. and M. M., do undertake and promise to and with the said A. B., that if judgment be rendered against the said C. D., on the said appeal, and execution thereon be returned unsatisfied, in whole or in part, we will pay the amount unsatisfied.

[*If the appeal is by the tenant, then continue:*]

And we do further undertake and promise, to and with the said A. B., that the said C. D. shall pay all rent accruing, or to accrue, upon the premises, the possession of which is sought to be recovered by the said A. B., in the proceeding before the said justice, aforesaid, subsequent to the application to said justice, and that in default thereof, we will pay the same.

In witness whereof we have hereunto set our hands and seals, this —— day of ——, A. D. 18—.

J. M. [SEAL.]
M. M. [SEAL.]

I approve of the above undertaking, and the sureties therein mentioned. Dated, &c.

A. D. W., County Judge.
[*Or*, C. L. A., Justice Sup. Court.]

No. 323.

Certiorari.

See ante, p. 474.

The People of the State of New York,—To A. D. W., Esq., County Judge of the county of —— [*or*, J. H. F., Justice of the
[SEAL.] Peace of the town of ——, in the county of ——,] greeting:

Whereas, we have been informed by the complaint of C. D., of, *&c.*, that certain proceedings were had before you on behalf of A. B., against the said C. D., under the statute relating to summary proceedings to recover the possession of land in certain cases, whereby [*state the order or proceeding complained of*], and we being willing, for certain reasons, to be certified of such proceedings, if any such were had before you, do command and strictly enjoin you, that you do certify and return those proceedings, with all things appertaining thereto, unto our justices of our Supreme Court of judicature, at the Court House, in ——, on the —— day of —— next, under your hand, as fully and amply as the same remain before you, so that our said justices may further cause to be done thereupon what of right and according to law ought to be done; and have you then there this writ.

Witness, C. L. A., Justice of the Supreme Court, at ——, the —— day of ——, A. D., 18—.

O. F. D., Attorney. N. B. M., Clerk.

[*Endorsed:*] "By the court."

N. B. M., Clerk.

No. 324.

Return to Writ of Certiorari.

See ante, p. 474.

[*Follow the form given in No.* 92, *altering it to conform to a return in summary proceedings*].

No. 325.

Judgment Record on Certiorari.

See ante, p. 474. Yates' Pl., 514.

Pleas, *&c.* [*as in No.* 184.]

State of New York, ss: The People of the State of New York, sent to A. D. W., county judge of the county of —— [*or other officer*], their writ of certiorari close in these words, to wit:

The People of the, *&c.* [*insert certiorari in full*].

At which day and place, in the return of the said writ mentioned, before the justices aforesaid, comes the said A. B., by S. D., his attorney, and the said C. D., by O. F. D., his attorney. And the said county judge [*or other officer*], to whom the said writ was directed, now here makes return thereto, as follows: [*insert return*].

And now, at this day, to wit on the —— day of ——, at the village [*or*, city] of ——, before the justices aforesaid, come the parties aforesaid; and the said court now here, having seen and fully understood all and singular the premises, and mature deliberation being thereupon had, it seems to the court now here, that the proceedings and adjudication of the said judge are in all respects irregular, erroneous, and void, [*or otherwise, according to the decision.*]

Therefore it is considered that the said proceedings and adjudication be, and the same are hereby, reversed and in all things held for nought [*or otherwise, as the decision may be*].

And it is further considered that the said A. B. [*or*, the said C. D.] recover —— dollars, for his costs and charges by him laid out and expended, in and about the prosecution of the said writ of certiorari [*or*, in and about his defence to the said writ of certiorari], adjudged to the said A. B. [*or*, C. D.], by the court now here with his assent, [and that the said C. D., have restitution of the premises aforesaid.]

Judgment signed this —— day of ——, 18—. N. B. M., Clerk.

No. 326.

Writ of Restitution.

See ante, p. 477.

The People of the State of New York, to the sheriff of the county of —— greeting:

Whereas, C. D., of ——, in said county, by certain proceedings had before [*name of officer*], under the provisions of article second, title ten, of chapter eight, of part third, of the Revised Statutes, entitled, "Summary proceedings to recover the possession of land in other cases," was removed from the possession of, *&c.*, [*describe premises*], and which proceedings we caused to be removed into our Supreme Court of judicature, by our writ of certiorari; and whereupon it was considered in our said court, before our said justices, that the said C. D., should be restored to the possession of the said premises, whereof the said C. D. is convicted, as appears to us of record.

Now, therefore, we command you forthwith to restore the said C. D., to the full possession of the aforesaid described premises; and how, and in what manner you shall have executed this our writ, make appear to our Supreme Court, at, *&c.*, on, *&c.;* and have then and there this writ.

Witness, *&c.* [*as in No.* 323].

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